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REPORTS OF DAWES COMMISSION.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

THE UNITED STATES, Appellant,
v.
BESSIE WILDCAT ET AL. } No. 741.

CERTIFICATE FROM AND CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is a bill in equity brought by the United States in its own behalf and in behalf of the Creek tribe of Indians against the heirs of Barney Thlocco for the purpose of having declared void and canceled an allotment certificate and deeds issued in his name as a Creek Indian allottee for 160 acres of the Creek tribal domain.

The bill avers that Thlocco was a Creek Indian who died prior to April 1, 1899, and therefore not subject to be enrolled and allotted under the Creek Agreement, ratified March 1, 1901 (31 Stat. 861, 870), effective May 25, 1901 (32 Stat. 1971); that the Commission to the Five Civilized Tribes (known as

the Dawes Commission), with authority under the Creek Agreement to enroll for allotment and allot Creek Indians living on April 1, 1899, arbitrarily and without evidence or knowledge of the life or death of Thlocco on that date, but acting upon the arbitrary assumption that he was a living person, enrolled him for allotment on May 24, 1901, caused to be issued in his name a certificate of allotment on June 30, 1902, and allotment deeds for the land in question on March 11, 1903, which were approved by the Secretary of the Interior April 3, 1903; that said deeds, although recorded in the office of the Dawes Commission, were never delivered to anyone but remain in possession of the plaintiff's officers; and that on December 13, 1906, the Secretary of the Interior caused the name of Thlocco to be stricken from the Creek tribal rolls (R. 5–7).

The bill also avers inability of the plaintiff to set out any evidence taken before or had by the commission respecting the question whether Thlocco was living or dead on April 1, 1899, because no such evidence was taken before or had by it (R. 6).

The answer admits the averments of the bill as to the enrollment of Thlocco in 1901, the issuance in his name of a certificate of allotment and allotment deeds, and the approval and recordation of the deeds, and avers that Thlocco was a living person on April 1, 1899; that he died prior to June 30, 1902, the date of the selection of his allotment; that the action of the Secretary of the Interior in causing the name of Thlocco to be stricken from the

rolls was without notice to the heirs of Thlocco and was illegal and void; that the Dawes Commission was "vested with full and complete power, authority and jurisdiction" to make this enrollment and allotment "upon such hearing and evidence as the Commission deemed satisfactory;" that its work having been approved by the Secretary of the Interior "said enrollment, allotment and patent can not be cancelled, nor can the issue of fact upon which the Commission placed the name of said Barney Thlocco upon the approved Creek roll be tried again," and that the "court is without authority of law or jurisdiction to reopen or retry the question of fact sought to be put in issue." The defendants also pleaded the federal statute of limitation of six years (26 Stat., §8, p. 1099), and laches.

The interveners Bisett, Posey, and others claim under an allotment of 5 acres of the land made to Posey on May 19, 1913, and join with the Government in its attack on the allotment to Thlocco. (R. 13, 17.)

No right as a bona fide purchaser or encumbrancer is asserted on behalf of any defendant or intervener.

On the trial the Government offered to prove by evidence clear and convincing that Barney Thlocco died before April 1, 1899 (R. 62–64, 111–112). Objection to this offer was sustained by the court on the ground that the question whether Thlocco was living on April 1, 1899, was concluded by the action of the Dawes Commission in placing his name upon the tribal roll for allotment and in making the allot-

ment in his name, unless it were first shown that such action had been induced by fraud, error of law, or gross mistake of fact (R. 41, 63, 65, 108–111). The court ruled that if the commission "acted without any evidence whatever, that judgment would amount to a gross mistake of fact and law" (R. 41). The Government then undertook to prove that the commission had so acted (R. 66–108).

The evidence on this point (discussed in detail, *infra*, pp. 24–28) showed: That Thlocco was enrolled on May 24, 1901, the last day before the ratification of the Creek Agreement, along with a large number of others appearing on the old tribal rolls and unaccounted for (R. 68, 73–74); that this was done in many cases without information as to whether the Indians were living or dead, or if dead when they died (R. 73, 85), in order to save every possible right, on account of a provision in section 28 of the Creek Agreement (31 Stat. 867) apparently forbidding enrollment of any person after its ratification (R. 67, 77, 85, 90, 98); that at this time no investigations were being made, as there was no time to investigate (R. 90, 92); that Thlocco's enrollment card was made out and completed on May 24, 1901 (R. 68, 90, 93, 99); that there was no subsequent investigation in the case of completed cards (R. 68, 86, 94, 95, 98); that these enrollments were made by clerks employed by the Dawes Commission upon such information as they could obtain, including oral statements not under oath and not reduced to writing (R. 69–70, 77, 86–87, 90, 95, 99); that the

commissioners accepted the judgment of the clerks on the enrollment cards (R. 100); that the clerk who enrolled Thlocco thought he must have had some information from some unremembered source regarding Thlocco's right to enrollment (R. 68, 69, 74); that this clerk "knew that Thlocco was dead" (R. 68), but nevertheless enrolled him as a living person at the time (R. 88, 90, 91, 93); and that he was subsequently allotted as a person living at the time of allotment (R. 79).

At the conclusion of this evidence, the Government again attempted to prove that Thlocco died before April 1, 1899 (R. 108). On objection by the defendants the court excluded the testimony on the ground that the Government had not "by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever" (R. 109). Thereupon the Government formally offered the testimony from personal knowledge of twenty-one witnesses that Thlocco died in January, 1899, which was rejected by the court upon the grounds before stated (R. 111–112).

It was proved without objection that, after the deeds to Thlocco were recorded in the office of the commission, on April 11, 1903, they were sent to the Principal Chief of the Creek Nation for delivery to the allottee, and that, a question having arisen as to whether Thlocco was entitled to an allotment, the deeds were recalled and placed in the files of the commission, where they have remained ever since (R. 49).

The Government then offered a record of proceedings before the commission instituted August 9, 1904, by the Creek Attorney, in which it was found upon sworn evidence, but without actual notice to the heirs of Thlocco, that Thlocco died before April 1, 1899, and upon which finding the Secretary of the Interior, on December 13, 1906, directed his name to be stricken from the tribal roll (Gov't Ex. 7, R. 51–61). Objection to this evidence was sustained upon the ground that so far as the action of the Secretary purported to affect the validity of the allotment to Thlocco it was taken without authority, and that so far as it related to the right to participate in the distribution of other tribal property, it had no place in this hearing (R. 40–42, 62).

The Government further offered to prove that no person claiming under Thlocco had taken possession of the land prior to cancellation of the enrollment by the Secretary or the institution of this suit (R. 50); that no instrument was filed for record in Creek County where the land is situated in any manner affecting the title until the year 1913 (R. 113), and that on February 17, 1911, the Government brought suit in the United States District Court against the unknown heirs of Thlocco and obtained a decree by default, after notice by publication, cancelling the allotment deeds, which case was reopened upon the application of parties claiming to be the heirs of Thlocco, and thereafter was dismissed by the Government on the same day the bill in this case was filed (R. 113–114). Objections to these offers were sus-

tained on the ground that the evidence was not material to the issues in this case. Exceptions to all adverse rulings were saved on behalf of the Government.

A decree was then entered dismissing the bill (R. 117) and the Government appealed to the Circuit Court of Appeals (R. 119). That court, after a hearing, certified to this court for decision the following questions (R. 200):

> 1. Should the evidence offered by the Government to show that Thlocco died prior to April 1st, 1899, have been admitted?
>
> 2. Should the evidence offered by the Government to show that Thlocco's enrollment was canceled by the Dawes Commission, have been admitted?
>
> 3. Were the certificate of enrollment and deeds to Thlocco null and void because he was dead at the time they were made?

Thereafter, upon application of counsel for defendants and interveners, to which the Solicitor General made no objection, the entire record and cause was ordered to be brought up for consideration.

The points arising under the various assignments of error (R. 120) which we desire to urge are presented by the first certified question. We maintain that the evidence offered to show the death of Thlocco prior to April 1, 1899, should have been admitted, for two reasons, namely:

> 1. The existence of Thlocco on April 1, 1899, was essential to the jurisdiction of the Dawes Commission over the subject.

2. The enrollment and allotment of Thlocco was made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899.

ARGUMENT.

I.

The existence of Thlocco on April 1, 1899, was essential to the jurisdiction of the Dawes Commission over the subject.

The powers and duties of the Dawes Commission with respect to enrollment of Creek Indians for the purpose of allotment are prescribed by section 21 of the Curtis Act of June 28, 1898 (30 Stat. 495, 502), and section 28 of the Creek Agreement, ratified by Congress March 1, 1901 (31 Stat. 861, 869), effective on ratification by the Creek Council May 25, 1901 (32 Stat. 1971).

By section 21 of the Curtis Act the commission was "authorized and directed to make correct rolls of the citizens by blood" of the Creek Tribe, "eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made" (30 Stat. 502). The allotment rolls were required to be made "descriptive of the persons thereon" for after identification, and authority was granted to the commissioners "to take a census of said tribes or to adopt any other means by them deemed necessary to enable them to make such rolls,"

with the right to "have access to all rolls and records" of the tribe (p. 503), and with power "to administer oaths, examine witnesses and send for persons and papers" (p. 504).

Section 28 of the Creek Agreement directed that "all citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one" of the Curtis Act "shall be placed upon the rolls to be made by said Commission under said act of Congress," provided for allotments to the heirs of those who subsequently died, and concluded as follows (31 Stat. 870):

> The rolls so made by said commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons.

The plan of allotment contemplated by the Curtis Act (§ 30, 30 Stat. 514) as well as that adopted by the Creek Agreement (§ 3, 31 Stat. 862) was one of equal distribution of the tribal property "as nearly as may be." According to this plan, the heirs of a member of the tribe who died before allotment would not inherit his distributive share. They were entitled to allotments in their own right and the addition of the right of their ancestor would give them an unfair share of the tribal lands. *La Roque* v. *United States*, 239 U. S. 62, 65; *Woodbury* v. *United States*, 170 Fed. 302, 305. The exception in the

Creek Agreement in favor of the heirs of Indians who died on or after April 1, 1899, was one of practical necessity. Under section 11 of the Curtis Act (30 Stat. 497) upwards of 10,000 tentative allotments had been selected by enrolled Creek citizens, beginning April 1, 1899. The Curtis Act had not been accepted by the Creek tribe but, in order to avoid the confusion and hardship which would have resulted from an attempt to vacate so great a number of selections already made, they were treated in the Creek Agreement (§ 6, 31 Stat. 863) the same as if made after its ratification. *Woodward* v. *de Graffenried*, 238 U. S. 284, 308–314. On this account, the provision in section 28 of the Creek Agreement for enrollment of all members who were living on April 1, 1899, was requisite as a matter of course in order to preserve equality of distribution.

It is therefore entirely clear that if Barney Thlocco died prior to April 1, 1899, his heirs were not entitled to an allotment in his name and his enrollment for such allotment was unauthorized.

The District Court held that the fact of Thlocco's existence on April 1, 1899, was concluded by the final judgment of the Dawes Commission (evidenced by the enrollment record, certificate of allotment, and allotment deeds), in the absence of clear and convincing proof that the enrollment was "based upon fraudulent testimony," or that Thlocco's existence on April 1, 1899, was "arbitrarily found without any testimony" (R. 110).

It is doubtless true that the Dawes Commission, acting under supervision of the Secretary of the Interior, was a special administrative tribunal vested with jurisdiction to enroll for allotment all Creek citizens who were living on April 1, 1899. But jurisdiction always presupposes the existence of a subject upon which the tribunal is competent to act. If Thlocco died prior to April 1, 1899, he was not then a Creek citizen. He was in truth a nonentity. He had no existence, either in fact or for the purpose of allotment to his heirs. *Iowa Land & Trust Co.* v. *United States*, 217 Fed. 11, 13.

It is a rule as old as the law that no judgment is ever conclusive as to the existence of a fact essential to the jurisdiction. In *Rose* v. *Himely*, 4 Cranch, 241, 269, Chief Justice Marshall said:

> The operation of every judgment must depend on the power of the court to render that judgment; or, in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction, unquestionably, depends as well on the state of the thing, as on the constitution of the court. If, by any means whatever, a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property.

This rule extends to the case of a judgment which recites the jurisdictional facts as having been found by the court upon evidence. The judgment record

may be contradicted as to such facts. This was decided in *Thompson* v. *Whitman*, 18 Wall. 457, 468, where the court by Mr. Justice Bradley said:

> It is not perceived how any allegation contained in the record itself, however strongly made, can affect the right so to question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done no statements contained therein have any force. If such statements could be used to prevent inquiry, a slight form of words might always be adopted so as effectually to nullity the right of such inquiry.

In that case the sheriff of a county in New Jersey was sued in a Circuit Court of the United States for taking and carrying away a vessel of the plaintiff. The defendant justified his action by the judgment of a New Jersey court which had ordered the vessel to be sold for violating a statute of New Jersey in reference to raking and gathering clams. It was held that the plaintiff was entitled to defeat the judgment by showing, as a matter of fact, that the vessel was not seized within the county to which the jurisdiction of the court was limited, although the judgment recited that it was.

A money judgment without personal service on the defendant within the jurisdiction is void, and lack of such service may be shown in contradiction of a recital of this jurisdictional fact, without other evidence. *Harris* v. *Hardeman*, 14 How. 333, 339–344; *Knowles* v. *Gaslight and Coke Co.*, 19 Wall. 58, 61; *Hall* v. *Lanning*, 91 U. S. 160, 165. Similarly, a judgment

by confession of an attorney in fact may be impeached simply by showing that the attorney acted without authority. *National Exchange Bank* v. *Wiley*, 195 U. S. 257, 269–270.

In divorce proceedings jurisdiction of the court is usually made to depend upon the fact that the plaintiff has been domiciled in the state for a certain length of time. A decree in such a case, when relied upon in another court, may be shown to be void for lack of jurisdiction by proof that the plaintiff in the divorce proceedings did not in fact maintain the required domicil, although the decree recites that he did. *Bell* v. *Bell*, 181 U. S. 175, 178; *Streitwolf* v. *Streitwolf*, 181 U. S. 179, 182–183. And this is true although both parties to the divorce proceeding were personally before the court. *Andrews* v. *Andrews*, 188 U. S. 14, 39–41.

A striking exemplification of this rule is the case of a grant of letters of administration on the estate of a living person by a court having jurisdiction only to administer estates of deceased persons. In such a case the court is presumed to have decided upon inquiry that the person whose estate is administered was dead. Yet proof that the person so adjudged to be dead was in fact alive is admissible and sufficient to impeach the judgment in a collateral proceeding. Such a judgment is wholly void if this fact, essential to the jurisdiction of the court, did not exist. *Scott* v. *McNeal*, 154 U. S. 34, 39–48, in which Mr. Justice Gray collected and reviewed a multitude of cases to the same effect.

Whether the court, in finding a fact upon which its own jurisdiction depends, acts upon evidence or without evidence is wholly immaterial, when it is shown that the fact did not exist. It was so regarded in *Scott* v. *McNeal*, 154 U. S. 34, where jurisdiction of the probate court was predicated upon evidence of death. At page 43, the court disapproved a decision of the Court of Appeals of New York holding letters of administration granted by the surrogate upon a live man's estate to be void, "because evidence was produced that the surrogate never in fact considered the question of death, or had any evidence thereof—thus making the validity of the letters of administration to depend not upon the question whether the man was dead, but upon the question whether the surrogate thought so." This and another New York case were the only decisions found in *Scott* v. *McNeal* to be out of harmony with the true rule, except the one before the court, which was reversed.

The following language of Chief Justice Marshall in *Griffith* v. *Frazier*, 8 Cranch, 9, 23, is illuminating on this point:

> In the common case of intestacy it is clear that letters of administration must be granted to some person by the ordinary; and though they should be granted to one not entitled by law, still the act is binding until annulled by the competent authority; because he had power to grant letters of administration in the case. But suppose administration to be granted on the estate of a person not really dead. The act, all will admit, is totally void.

> Yet, the ordinary must always inquire and decide whether the person whose estate is to be committed to the care of others, be dead or in life. It is a branch of every cause in which letters of administration issue. Yet the decision of the ordinary that the person on whose estate he acts is dead, if the fact be otherwise, does not invest the person he may appoint with the character or powers of an administrator. The case, in truth, was not one within his jurisdiction; it was not one in which he had a right to deliberate; it was not committed to him by the law.

The same rule is applied to proceedings in the Land Department which culminate in the issuance of a patent. Questions of fact within the jurisdiction of that department are considered as settled by its rulings preliminary to patent. But questions of fact upon which its jurisdiction depends are never so regarded. In *Doolan* v. *Carr*, 125 U. S. 618, 625, upon a careful examination of the prior decisions, the court by Mr. Justice Miller said:

> The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

Want of authority may have reference either to the land described in the patent or to the grantee named therein. If the land was not subject to be patented (*Burfenning* v. *Chicago, St. Paul &c., Ry.* 163 U. S. 321, 323, and cases cited), or if the grantee had no existence (*Moffat* v. *United States*, 112 U. S. 24, 31; *Sampeyreac* v. *United States*, 7 Pet. 222, 241; *Hall* v. *Russell*, 101 U. S. 503, 509), the patent is a nullity and conveys no title. Whether such a patent was induced by fraud or mistake, or resulted from a lack of evidence, is not controlling. The inquiry is as to the existence of facts essential to the jurisdiction. "In such cases, the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Smelting Co.* v. *Kemp*, 104 U. S. 636, 641.

A land patent, like a judgment, is void if there be want of jurisdiction over the subject, and this may be shown in any collateral proceeding. *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174, and cases cited. Yet in the case of a patent, where the defect does not appear on the face of the instrument or from the law upon which it is founded, but rests upon proof of extrinsic facts, administrative officers are not competent to find such facts and determine the nullity. That is a judicial act, and requires the judgment of a court. For this reason the Government, to obtain a cancellation of the patent, must resort to a suit in equity. In such a suit, however, all that need be alleged and proved as ground for relief is the fact which shows

the want of authority to issue the patent. Fraud, if it exist, is an additional or incidental ground, but it is not essential. *United States* v. *Stone*, 2 Wall. 525, 535–536; *Mullan* v. *United States*, 118 U. S. 271, 278–279; *Moran* v. *Horsky*, 178 U. S. 205, 211–212.

In *Moffat* v. *United States*, 112 U. S. 24, 31, the Government obtained a decree cancelling certain preemption patents which had been issued to fictitious persons. The suit was resisted by purchasers claiming title through mesne conveyances without notice. But the patents were held to be nullities conveying no title under which subsequent purchasers could claim protection. In that case there was fraud on the part of the register and receiver, who concocted documents and made false records upon which the patents were issued. But it is evident that fraud was not the sole basis of the suit. If the grantees had actually existed and the patents had been issued on false proofs of their qualifications or compliance with the preemption law, the patents would have been voidable and subject to cancellation for that reason, but they would not have been utterly void so as to cut off the rights of subsequent purchasers without notice of the fraud. They were void and that result followed, not because of fraud, but because the grantees had no existence. *Colorado Coal Co.* v. *United States*, 123 U. S. 307, 313.

In *La Roque* v. *United States*, 239 U. S. 62, it was held that the act of January 14, 1889 (25 Stat. 642), under which the Chippewa Indians in Minnesota were

allotted, authorized allotments only to living Indians, and that therefore an allotment trust patent issued in the name of one who died before allotment was void and conveyed nothing to his heirs. In that case it was conceded that the Indian died before allotment. So in this case it stands admitted, upon the Government's offer of proof, that Thlocco died before April 1, 1899. Whether the Department of the Interior acted upon evidence of the Indian's existence before allotment in the *La Roque case* was not considered. Presumably it did. But it is hardly conceivable that the allotment would have been any the less void for want of authority to make it by the fact that it was made upon evidence. The question was as to the fact of death before allotment. That fact being conceded, the nullity of the allotment resulted as one made without authority of law.

The case of *Iowa Land & Trust Co.* v. *United States*, 217 Fed. 11, known as the *Hawkins case*, decided by the Circuit Court of Appeals for the Eighth Circuit on July 29, 1914, is in all substantial respects like the case at bar. In that case the United States sued in behalf of the Creek tribe to have declared void and canceled an allotment certificate and deeds issued in the name of Chester Hawkins as a member of the tribe. It was shown that Hawkins died May 27, 1898, and that he had been enrolled upon evidence filed with the Dawes Commission which tended to show that he was living on April 1, 1899. It was held that the allotment deeds were utterly void even

as against the plea of a bona fide purchaser without notice. The court, speaking through Judge Carland, said (p. 13):

> Chester Hawkins, having died before April 1, 1899, must be considered as having had no existence, so far as being a citizen of the Creek Nation entitled to an allotment of land under any law of Congress. The patents issued by the Creek Nation ran to a person not in being, and therefore conveyed no title whatever. There being no ancestor entitled to an allotment of land, there was no land to which the heirs of Chester Hawkins were entitled.

The report of that case shows that the enrollment of Hawkins was induced by false evidence filed with the commission. But this was merely incidental. It was not the sole basis of the right to show the nonexistence of Hawkins on April 1, 1899. The suit was not founded simply on fraud or false testimony. If it had been, the allotment deeds would have been voidable merely, not void, and the plea of innocent purchaser would have prevailed. If it had been shown that Hawkins lived on April 1, 1899, and that his allotment had been induced by false testimony concerning his qualifications to receive an allotment, the allotment deeds would still have been voidable, but the bona fide purchaser without notice would have received protection.

If the ruling of the District Court in the case at bar had been applied in the *Hawkins case*, the Government would certainly have failed, because in that

case the commission unquestionably acted upon evidence. It does not suffice to say that, under the ruling in the case at bar, it was open to the Government to allege and prove the falsity of the evidence, if any, upon which the commission acted as a ground for attacking its determination that Thlocco was alive, because it is obvious that the only proof of such falsity that could be adduced was proof that he was dead. A rule that evidence must first be shown to be false before the only existing evidence of its falsity can be admitted would be a plain denial of all relief against wrong perpetrated by false evidence.

This is not a case like *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 166, 176, where the question was whether a certain railroad company was legally qualified to obtain the benefits of the general right-of-way act of March 3, 1875 (18 Stat. 482), and the suit was to enjoin the execution of an order revoking a final approval of the company's map of definite location. The act having vested in the Secretary of the Interior authority to perfect right-of-way grants by approval of location maps of railroad companies, it was held that the company's qualification to receive the grant was not a jurisdictional fact but one which the Secretary had authority to determine, and that such determination, having passed the title, could not be revoked by a subsequent departmental order. If the grantee company in that case had not in fact had any existence, and if that case had been a direct proceeding on behalf of the Government to set aside

the Secretary's approval on that ground, a very different question would have been presented.

II.

The enrollment and allotment of Thlocco were made arbitrarily and without evidence as to whether he was living or dead on April 1, 1899.

From the allotment certificate and deeds there arises a presumption that the commission acted upon substantial evidence of Thlocco's right to allotment. The question is whether that presumption has been rebutted.

What precedent determination of Thlocco's right to allotment do the allotment certificate and deeds imply? Clearly that he was a Creek Indian living at the time of their issuance, but not that he lived on April 1, 1899, and died before allotment.

Sections 7 and 28 of the Creek Agreement (31 Stat. 861, 863, 870) required allotments to be made to living Indians in two tracts, homestead and surplus, and, in case of death before allotment, in one tract to the heirs. *Mullen* v. *United States*, 224 U. S. 448, 455–456. The witness, Hopkins, who acted as chief clerk and attorney for the commission at the time of this transaction, testified (R. 79):

> There was a form of certificate of allotment prepared for use in the Creek Nation in cases of allotment made to the heirs of deceased citizens; there were three forms of patents prepared, one for the allotment of the homestead, another for the allotment of the surplus, and one for allotments to the heirs of deceased

> citizens. It was the practice of the Commission, in cases where the enrolled citizen was dead, to allot the lands to his heirs.

The Annual Report of the Dawes Commission for 1902, at page 40, states:

> It was necessary that the 40 acres designated as a homestead be deducted from the allotment of 160 acres; so that separate deeds might be issued for the same. . . .
>
> Three forms of conveyances have been prepared, viz.: Allotment deeds, homestead deeds, and deeds to the heirs of deceased persons. . . .
>
> Accompanying this report and marked exhibits 8, 9, and 10 will be found specimen forms of these deeds.

The first two of these forms, appearing on page 162, are for separate deeds to living Indians for the homestead and surplus, and the third, on page 163, is for a single deed to the heirs of a deceased Indian for the entire allotment.

The certificate in this case runs to Thlocco in person and designates the homestead and surplus lands separately (R. 44½), and the deeds, also running in his name, purport to convey the tracts so designated separately (R. 47, 48), both on the forms provided for living persons.

The uniformity of the practice of the commission in issuing deeds to the heirs of deceased allottees instead of to the allottees in person is shown by the following statement in its report for 1906, at page 648:

> Prior to the act of April 26, 1906, it was necessary that deeds covering the lands of

> deceased allottees be issued to the heirs of the deceased, and in cases where deeds had been issued before evidence of death was received it was necessary to recall them and issue new deeds to their heirs. For this reason 220 deeds were canceled during the past year and new deeds to the heirs of deceased allottees issued in their stead.

The question then is: Was there any justification for the presumptive finding that Thlocco was living on the date of the allotment certificate (R. 44½), June 30, 1902, and on the date of approval of the deeds (R. 47, 48), April 3, 1903? Upon this the record is conclusive, for in the answer of the defendants it is alleged "that said Barney Thlocco had died prior to the selection and allotment of said land, which was made on the 30th day of June, 1902" (R. 31, par. viii).

The presumption arising from the instruments under which the defendants claim is that Thlocco was found to be living when those instruments were issued. That presumption is completely rebutted by the defendants themselves. It can not be said that, notwithstanding Thlocco's death before allotment, he was presumably found to be living on April 1, 1899, for in that case the allotment would have been made to his heirs and not to him in person. This alone is sufficient to establish the fact that Thlocco was allotted without evidence of his right to allotment.

But assuming, without admitting, that this is inconclusive, we inquire as to what, if any, substan-

tial evidence the commission had of Thlocco's existence before the time he was admittedly dead.

The presumption arising from the enrollment, as in the case of the allotment certificate and deeds, is that Thlocco was living at that time, but not that he was living April 1, 1899, and had since died. It was the established practice and rule of the commission not to enroll any dead person except upon affidavit, for a permanent record, that he was living on April 1, 1899, in which case a notation would be made on the "census card" (as the enrollment record was called), giving the date of death or referring to such affidavit (R. 75, 85, 88, 89, 91, 93). No such affidavit was obtained or notation made in the case of Thlocco, and his completed card (R. 38½) therefore shows that he was treated as alive on the day of its date, May 24, 1901, and that no investigation was made or information received and acted on as to the date of his death (R. 88, 90–91, 93, 99). However, the clerk, Merrick, who enrolled Thlocco on May 24, 1901 (R. 68), and upon whose information the enrollment was passed by Commissioner Bixby (R. 70, 95, 100), testified that, at the time of this enrollment, "we knew that Thlocco was dead" (R. 68). If this be true, then the enrollment record must necessarily be false, unless it be presumed that in this particular instance the rule and practice of the commission with respect to making the record in such cases was arbitrarily disregarded.

Assuming that the commission thus arbitrarily disregarded its established practice in this instance,

we finally inquire as to whether there was before the commission any substantial evidence of Thlocco's existence on April 1, 1899.

The name of Thlocco appears on the 1895 tribal roll (R. 80½), and also on an "old census card" (R. 72½) made by the clerk, Hopkins, in 1897 (R. 76), indicating that he lived on those dates. The ordinary presumption that a person continues to live for seven years in the absence of contrary evidence might have afforded some ground for holding that Thlocco lived beyond April 1, 1899 (R. 75; *Folk* v. *United States*, 233 Fed. 177, 189; *Scott* v. *McNeal*, 154 U. S. 34, 49–50). But the commission did not act on this presumption. Merrick, who wrote the enrollment card, and Commissioner Bixby, who passed it for approval, both testified that they must have had some information outside the records that Thlocco was living on April 1, 1899, else he would not have been enrolled (R. 69, 70, 74, 75, 95, 99).

At the time of the transaction in question the enrollment work was extremely pressing. The name of Thlocco was enrolled on May 24, 1901, the last day before the ratification of the Creek Agreement, along with a large number of others appearing on the old tribal rolls and unaccounted for (R. 68, 73–74). This was done in most cases without information as to whether the Indians were living or dead, or, if dead, when they died (R. 73, 85), in order to save every possible right on account of a provision in section 28 of the Creek Agreement (31 Stat., 867), which apparently forbade enrollment of any person after its rati-

fication (R. 67, 77, 85, 90, 98). At this time no investigations were being made; there was no time to investigate (R. 90, 92). During the last two or three days before May 25, 1901, the clerks were working under great pressure, enrolling 200 to 300 names a day (R. 66) and working far into the night (R. 73). Thlocco's enrollment card was made out and completed on May 24, 1901 (R. 68, 99). There was no subsequent investigation in the case of completed cards (R. 68, 86, 94, 95, 98). These enrollments were made by clerks employed by the Dawes Commission upon such information as they could obtain, including oral statements not under oath and not reduced to writing (R. 69–70, 77, 86–87, 90, 95, 99), with the result that they "were often imposed upon" (R. 68, 74). The commissioners accepted the judgment of the clerks on the enrollment cards (R. 100), and this was done in the case of Thlocco by Commissioner Bixby (R. 70, 99, 100). As to the nature or source of the information upon which Thlocco was enrolled no one concerned in the transaction had any recollection (R. 69, 75, 98). No records other than the enrollment cards were made except in contested cases (R. 87, 88, 91, 99). Nothing else was sent to the Secretary of the Interior (R. 67, 95–97), and his approval was therefore perfunctory (R. 196).

At the time of Thlocco's enrollment there was a pencil notation opposite his name on the 1895 tribal roll, "Died in 1900" (R. 80½), which the clerk, Merrick, thought might possibly have been considered

sufficient evidence (R. 75). This notation was made by Hopkins, another clerk, who testified that he didn't know when or from whom he got the information, except that it was some time prior to the enrollment (R. 82–83), that it was not sufficient upon which to base an opinion (R. 83), but was intended to indicate "that an inquiry should be made as to when Thlocco died or whether he was dead and get the proper affidavit" in accordance with the established practice, and that this information "was given by somebody who was not in a position to make an affidavit of death" (R. 78, 83). The notation made by Hopkins was, as another clerk testified, no more than "an invitation to investigate" (R. 93).

A circumstance which the District Court regarded as "a very significant feature" and which was given controlling force against the Government (R. 109) was one showing that the clerk, Merrick, who enrolled Thlocco, had some information from somebody about Thlocco outside of the records. Besides the old tribal roll he had the "old census cards" which gave the necessary descriptive matter for the enrollment cards. He had the old census card of Thlocco, made in 1897, which he was certain that he had used. On comparing the two cards (R. 38½, 72½), he testified: "I will have to say that in view of the fact that the age on the old census card is given as 40 and that on the new as 35, and the post office is different, that I must have had some information other than the old census card" (R. 69). Hopkins also had some information when he made the old census card in 1897, acquired,

not under extraordinary pressure, but in the course of an investigation in the field (R. 76). He also noted a daughter of Thlocco, 15 years of age in 1897 (R. 72½), and therefore 19 in 1901 when Merrick enrolled the father as 35, a variance naturally calling for investigation. At best the circumstance to which the court gave controlling effect exhibits no more than a conflict of indefinite "information" received by two of the clerks, while demonstrating the unreliability of that upon which Merrick was acting and by means of which, as he testified, "we were often imposed upon" (R. 68, 74).

Summarizing the facts, it appears that the allotment was made to Thlocco as a living person, when he was admittedly dead; that he was enrolled as a living person, though he was known to be dead; that the enrollment was made by a clerk of the commission, without any investigation of the time of Thlocco's death, though he was warned to investigate; that this clerk's record of the enrollment was accepted by one commissioner without further investigation or additional evidence; that the enrollment so made was reported to the Secretary of the Interior for approval without any additional record; that the Secretary's approval thereof was perfunctory; that the only evidence before the enrollment clerk of Thlocco's existence on April 1, 1899, was a pencil notation on the tribal roll "Died in 1900," which notation had been made previously by another clerk upon hearsay information and merely as a warning to investigate; and that the clerk who enrolled

Thlocco might have had some indefinite information from some unascertainable source about Thlocco outside the records, which information, if any, was obtained at a time of great pressure and contradicted the record description of Thlocco in such wise as to have no other legitimate effect than to call for an investigation.

If it could be said upon these facts that the Dawes Commission enrolled and allotted Thlocco upon substantial evidence of his right thereto, it would be difficult to imagine a case in which a lack of evidence could be shown. And if the Government's ability to show a more certain lack of evidence as to existence of an allottee on April 1, 1899, conditions its right to prove his nonexistence on that date, it must result that no allotment wrongfully made without evidence to one who had no existence on the inhibitive date could ever be canceled.

STATUTE OF LIMITATION AND LACHES.

The statute of limitation invoked by the defendants (act of March 3, 1891, §8, 26 Stat. 1099) refers only to suits to cancel patents issued for public lands of the United States and therefore has no application to a suit of this kind to cancel Indian allotment deeds. *La Roque* v. *United States*, 239 U. S. 62, 68.

The charge of laches is equally without merit. The allotment deeds were approved April 3, 1903, and recorded in the office of the commission April 11, 1903 (R. 47, 48). They were then sent to the Principal Chief for delivery and afterwards recalled when

Thlocco's right to allotment was questioned (R. 49). On August 9, 1904, the Creek attorney instituted proceedings before the Commission to strike Thlocco's name from the roll because of his death before April 1, 1899, whereupon, on August 25, 1904, Commissioner Bixby "recommended that the case be reopened and that a rehearing be ordered" (R. 52). On September 7, 1904, the Commissioner of Indian Affairs concurred in this recommendation (R. 53). On September 16, 1904, the Secretary of the Interior ordered a rehearing (R. 55). During the year 1905 an investigation was conducted in which witnesses testified under oath that Thlocco died in January or February, 1899, of smallpox (R. 56–58). On February 9, 1906, Commissioner Beall issued to the heirs of Thlocco notice of a hearing for February 19, 1906 (R. 58), and an attempt was made to locate these heirs but was not successful (R. 60). On October 10, 1906, Commissioner Bixby reported to the Secretary of the Interior that the testimony submitted "conclusively establishes the date of the death of Barney Thlocco as prior to April 1, 1899," and recommended that his name be stricken from the approved roll (R. 59–60). On December 13, 1906, the Secretary directed Thlocco's name to be stricken from the roll, and requested the Attorney General to take action to set aside the allotment deeds (R. 61). On February 17, 1911, suit was instituted by the Government against the unknown heirs of Thlocco and, after service by publication and default, a decree was

rendered July 29, 1911, canceling the allotment deeds (R. 48, 113). On July 13, 1913, the cause was reopened on application of persons claiming to be the heirs of Thlocco, and thereafter dismissed on motion of the Government November 1, 1913, the day the present bill was filed (R. 113). The land was unoccupied and unclaimed by any person until 1913 (R. 50, 113).

There has been no delay to the injury of any person. No claim is asserted as a subsequent purchaser or incumbrancer on the faith of the allotment deeds. No testimony has been lost by lapse of time. Every person concerned in the transaction was present and testified at the hearing.

CONCLUSION.

The decree of the District Court should be reversed.

Respectfully submitted.

JOHN W. DAVIS,
Solicitor General.

FRANCIS J. KEARFUL,
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APRIL, 1917.

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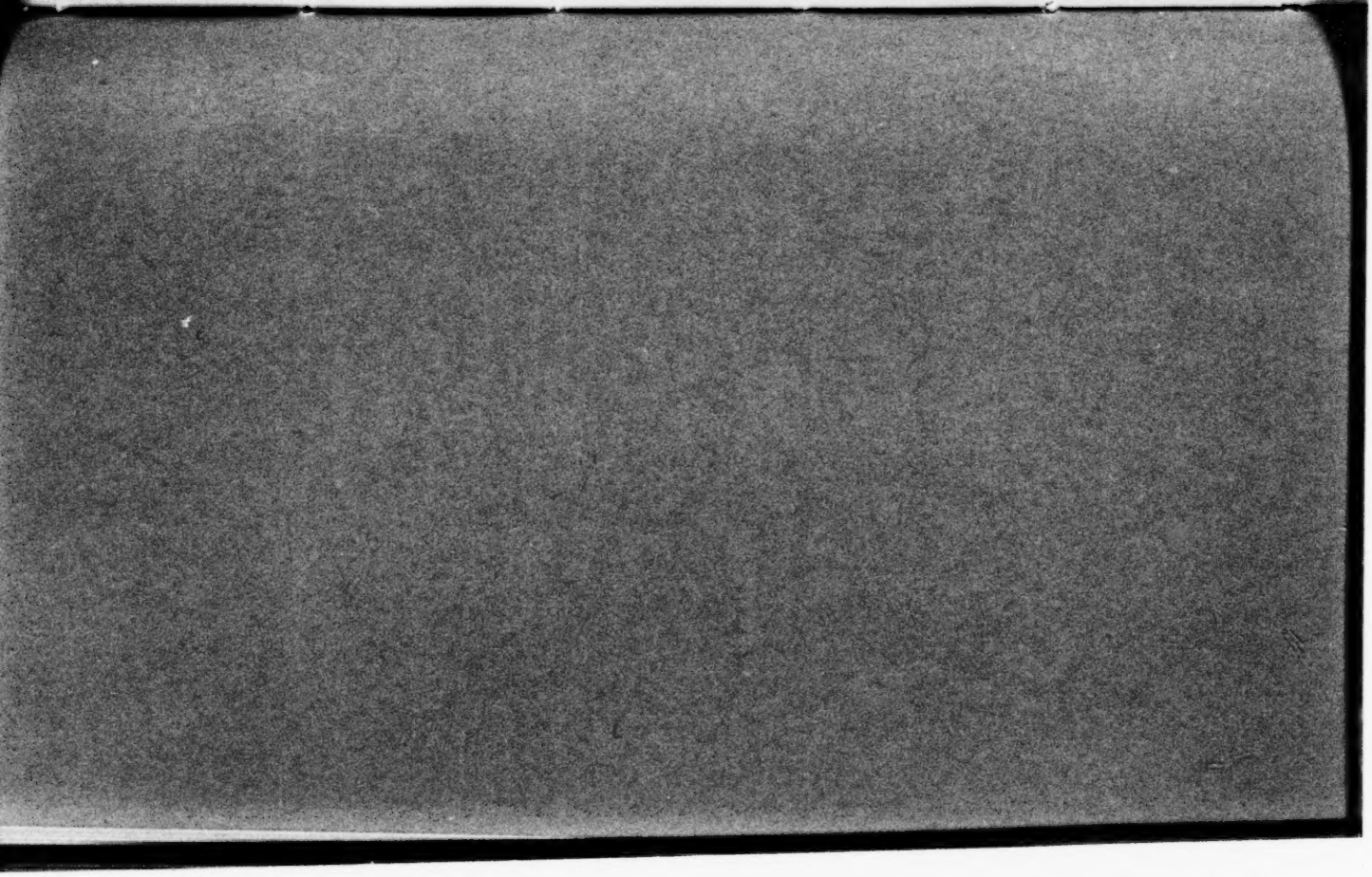

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TABLE OF CASES.

OTHER AUTHORITIES.

In the

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 741.

THE UNITED STATES, - - - - - - *Appellant,*

vs.

BESSIE WILDCAT, a Minor, *et al.*, - - *Appellees.*

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF APPELLEES, CHARLES F. BISSETT, TOXAWAY OIL COMPANY, F. L. MOORE AND J. S. COSDEN, IN SUPPORT OF THE GOVERNMENT'S APPEAL.

This brief is filed by the appellees, Charles F. Bissett, Toxaway Oil Company, F. L. Moore and J. S. Cosden, solely in support of the appeal from the decree of the trial court dismissing the appellant's bill. The connection of these appellees with, and their interest in, the case, will appear from the following statement of facts:

Statement of the Case.

This suit is one instituted by the United States on behalf of the Creek Nation of Indians, to cancel an allotment of certain lands of the Creek Nation to one Barney Thlocco, as made by the Commission to the Five Civilized Tribes, without authority of law, because Barney Thlocco was not alive on April 1, 1899, and his enrollment was therefore in violation of the Act of Congress approved March, 1, 1901, and ratified by the Creek Nation May 25, 1901, which provides for the enrollment of those Creek citizens living on April 1, 1899.

The facts and circumstances upon which the suit is predicated, briefly stated, are as follows: One Barney Thlocco was, in his lifetime, a Creek Indian by blood whose name appeared on the Creek Tribal Rolls. In 1897 or 1898, the Dawes Commission under authority of the Acts of Congress relative thereto, made a list or census of all living Indians who would be entitled to be placed on the roll then in contemplation, as a basis for the division of the tribal land. This list or census was made up on cards upon which the names of such citizens were placed, and which cards were subsequently known as the "Old Census Cards." Under the Act of June 28, 1898, known as the Curtis Act, the work of enrollment in

the Creek Nation was proceeded with, until the passage by Congress of the Act of Congress approved March 1, 1901, known as the Original Creek Agreement. This act provided that it should be of full force and effect when ratified by the Creek National Council, and which ratification was required to be made within ninety days of the passage of the act by Congress. By the month of May, 1901, the majority of the Creeks had been enrolled, but there remained a large number, whose names appeared on the old census cards, who had not made application for enrollment and who were not accounted for. In view of that fact, the Creeks were reluctant to ratify the Act of Congress referred to, as it contained a provision that no person should be added to the rolls of citizenship of the tribe after the date of the agreement, and that no person whomsover should be added to said rolls after the ratification of the agreement. This provision was construed by the Creeks as meaning the rolls prepared by the Dawes Commission, and officers of the Creek Nation were demanding to know what would become of those persons who had not yet appeared to be enrolled. Evidently, they were of the opinion that if the agreement was ratified, such persons would be excluded from any right to be on the approved roll. Because of these objections, an enrolling party was made up by the Dawes Commission which proceeded to Okmulgee, the capital of

the Creek Nation, and with the aid of the United States Marshal, this enrolling party succeeded in bringing in a large number of persons who had not made application to be enrolled. Up to May 25, 1901, in spite of these efforts, there were still quite a number of such persons remaining unaccounted for, and among them was Barney Thlocco. In the meantime, the Creek National Council was delaying the ratification of the agreement. Between May 20th and May 25th, the names of all such persons whose names appeared on the Tribal Rolls or upon the old census cards, and who had not been accounted for, were listed on new cards, that is to say, they were tentatively enrolled, but subject to further investigation, in order to satisfy the objection of the Creeks. Several hundred such persons were so listed on the three days prior to May 25th, on which date the agreement was ratified by the Creek National Council, being eighty-five days after the passage of the Act by Congress.

In pursuance of their purpose in making the tentative enrollments referred to, the Commission entered upon an investigation of the status of the persons so listed. In the case of Barney Thlocco, after a hearing in the matter at the instigation of the Creek Nation, and in pursuance of directions from the Secretary of the Interior, the Commission

found and determined that Barney Thlocco died prior to April 1, 1899. The investigation which led to such result was begun on April 9, 1904, and was concluded October 10, 1906, when the result of its investigation was transmitted to the Interior Department at Washington. Prior to this date, the name of Barney Thlocco had been placed on the approved roll, and the Commission therefore asked the Secretary of the Interior for authority to strike his name from such roll. The authority was granted, and on December 13, 1906, the Secretary of the Interior cancelled the enrollment of Barney Thlocco and struck his name from the roll in his possession, and on the same day authorized the Commission to take similar action as to the roll in its custody, which was done.

Prior to the proceedings detailed above, the Commission had arbitrarily, and without application of any one therefor, selected an allotment for Barney Thlocco which is the land involved in this suit. The land was selected in the name of Barney Thlocco, and on March 11, 1903, allotment patents were issued for the land in his name, all of which was done apparently upon the theory that he was then living. These patents were never delivered, and are still in the possession of the government, marked "cancelled." The cancellation of the patents was in pursuance of a decree of the United States Court for

the Eastern District, entered on July 29, 1911, in equity case No. 1543, *United States* v. *Unknown Heirs of Barney Thlocco*. This decree, however, was afterwards set aside, and the case re-opened, and on November 1, 1913, the date upon which this suit was instituted, the plaintiff dismissed the case.

Upon this state of facts, the Government brought this suit to cancel the allotment so made. The bill, after alleging its duty and obligation to the Creek Tribe of Indians, alleges substantially, that Barney Thlocco died in the beginning of the year 1899, prior to April 1, 1899, and that he was therefore not entitled to be enrolled as a citizen of the Creek Nation, or to receive in allotment any part of its lands; that the Commission to the Five Civilized Tribes caused the name of Barney Thlocco to be placed on the rolls of Creek citizens, then being prepared under the acts of Congress; that no hearing was held or investigation made by said Commission, and no evidence was produced or obtained with respect to the right of Barney Thlocco to be enrolled, and that no notice was given to the Creek Nation or its officers, that Barney Thlocco was about to be, or would be enrolled, and that there was no controversy, contest or adverse proceedings of any kind, by, or before, the said Commission, with respect to the enrollment of Barney Thlocco or his right to be so enrolled; that in plac-

ing the name of Barney Thlocco on the roll, the Commission acted arbitrarily and without knowledge, information or belief that he was living or dead on April 1, 1899, but acted on the arbitrary and erroneous assumption that he was living on the said date; that the Commission in thus enrolling Barney Thlocco, made a gross mistake of fact and of law, but that the plaintiff is unable to set up the evidence taken by the Commission respecting the question whether Barney Thlocco was living or dead on April 1, 1899, because no evidence was taken or had by such Commission. The bill further alleges that after the erroneous enrollment of Barney Thlocco, the Commission purported to allot in the name of Barney Thlocco, the land described in the bill, and on June 30, 1902, issued a certificate of allotment in the name of the said Barney Thlocco, as if he were a living person; that on April 3, 1903, the Commission caused to be executed homestead and allotment patents in the name of Barney Thlocco, neither of which patents have been delivered, but are in possession of the complainant, through its officers and agents. The bill alleges that no knowledge or information as to the mistake by the Commission in causing the enrollment of Barney Thlocco was had by the plaintiff until after the execution of said patents, nor was it known to the plaintiff until after that date that Barney Thlocco had died prior to April 1, 1899. It is

also alleged in the bill that on December 13, 1906, the Secretary of the Interior, by his executive order, caused the name of Barney Thlocco to be stricken from the roll of citizens of the Creek Nation, and that the said Barney Thlocco is not an enrolled citizen by blood, and has never been entitled to an allotment of land in the Creek Nation.

The bill prays for a cancellation of said patents as a cloud upon the title of the Creek Nation to said lands, and that the defendants be decreed to have no right, title or interest therein.

A large number of persons were permitted to intervene and be made parties to the suit, setting up their alleged rights to the property in controversy.

To the plaintiff's bill, all the defendants and intervenors, except Charles F. Bissett, Toxaway Oil Company, F. L. Moore and J. S. Cosden, filed a joint answer, by which they allege that the bill of complaint does not state facts sufficient to constitute a cause of action or entitled the plaintiff to the relief prayed for; they deny that Barney Thlocco died prior to April 1, 1899, and that he was not entitled to be enrolled as a citizen of the Creek Nation, or to receive an allotment of its lands; that the Commission did not make a mistake in the enrollment of

Barney Thlocco and did not act without evidence or arbitrarily, but that said Commission acted in accordance with the law and upon the evidence which was before it at the time, and which evidence said Commission found to be satisfactory and sufficient in law and in fact to authorize the placing of the name of Barney Thlocco on the rolls. They admit that the Commission allotted the lands in the name of Barney Thlocco and issued a certificate of allotment in his name, after his death, but deny that the allotment certificate was issued upon the arbitrary assumption that Barney Thlocco was a living person on April 1, 1899, and allege as a matter of fact that he was a living person on said date, and entitled to be placed on said rolls and to an allotment.

Charles F. Bissett, Toxaway Oil Company, F. L. Moore and J. S. Cosden, by leave of court, filed an intervening petition and cross-petition, in which they set up that on May 19, 1913, and after the decree of the United States Court cancelling the allotment, the Commission to the Five Civilized Tribes issued an allotment certificate to one Johnathan R. Posey, covering the West Half of the Southwest Quarter of the Northwest Quarter of Section Nine (9), Township Eighteen (18) North, Range Seven (7) East, which is a portion of the land allotted to Barney Thlocco. That this allotment certificate was

duly filed and recorded in the office of the Commissioner of the Five Civilized Tribes and in the office of the Register of Deeds for Creek County; that on the 19th day of May, 1913, said Johnathan R. Posey, after his selection of the land, executed and delivered an oil and gas mining lease of the lands above described, and of which said lease the intervenors were the owners; that the alleged heirs of Barney Thlocco have no interest in said land or in the oil and gas mining lease thereon and that the allotment of Barney Thlocco was made, and the patents in pursuance thereof issued, through gross fraud and mistake of the Commission in charge of the enrollment of citizens of the Creek Nation, and the allotment of lands to said citizens, and that Barney Thlocco was not alive on April 1, 1899, and was therefore not entitled to allotment. The intervenors further allege that a judgment of the United States District Court for the Eastern District of Oklahoma had determined that Barney Thlocco was not entitled to enrollment, and that such judgment, while afterwards set aside by the court, was not void, but merely voidable; and that, between the rendition of said judgment and the setting aside of the same, Johnathan R. Posey was allotted the lands above described. The intervenors pray that they be decreed to be the owners of a valid oil and gas lease on the lands, and that their title thereto be quieted. The position of these

intervenors is, therefore, not antagonistic to that of the Government, and they have an interest in common with the appellant in obtaining the relief prayed for by the bill. No issue was made up or tried upon their intervening petition nor as between these intervenors and those opposing the Government, except as their interest was involved in the issues upon the bill and answer. At the trial, counsel for the intervenors were, therefore, permitted to appear with and on behalf of the complainant, and this brief is filed, as heretofore stated, in support of the appeal prosecuted by the Government, and for that purpose only.

Proceedings in the Trial Court.

The Government first offered in evidence that part of the approved roll of Creek citizens showing the name of Barney Thlocco stricken therefrom on December 13, 1906, by authority of the Department (Assignments 2 and 27, pages 20 and 23 herein). This offer was rejected on the ground that the Secretary of the Interior had no power to strike such name from the roll upon that date, because of the following provisions of section 5 of the Act of Congress of April 26, 1906:

> " That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter

> issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his hiers."

The court took the view that patents to the land, theretofore arbitrarily selected, having been prepared by the Dawes Commission, and signed by the Principal Chief of the Creek Nation on April 3, 1903, and duly approved by the Secretary of the Interior, the title to such lands, even although the patents were made in the name of a person admittedly dead, passed out of the Government and became vested in the heirs of Thlocco, by virtue of the above quoted provisions of the Act of 1906.

In view of this ruling, the Government next offered to prove (Assignment No. 6, pp. 20-23 herein) that from April 9, 1904, to December 13, 1906, the question of Thlocco's right to enrollment as a person living on April 1, 1899, was under investigation by the Department; that a hearing was had and evidence was taken and preserved upon that issue; that as a consequence thereof, and upon the evidence taken, the Dawes Commission found and determined that Barney Thlocco died prior to April 1, 1899, and was unlawfully enrolled, and the Secretary of the Interior, upon review of the evidence, finding and

decision of the Commission, approved the same and stuck the name of Thlocco from the roll. This offer was made as a part of the Government's case, and for the purpose of showing that the provisions of the Act of April 26, 1906, could not, and were not, intended to nullify and put an end to the right of the Secretary of the Interior to pursue to final determination and judgment an inquiry and hearing begun in his Department long before the Act of 1906, and which hearing was pending at the time of the passage of that Act, if for no other reason than that the same section of the act itself provides that:

> " The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior, at the date of the approval of this act."

An objection was also sustained to this offer, and the Government then offered to prove by the independent testimony of witnesses who knew the facts that Barney Thlocco died prior to April 1, 1899. (Assignments No. 8 and 22, pp. 15-19 herein.) Objection was sustained to this offer, the court ruling that before any evidence of that character was admissible, the Government must prove by clear and convincing evidence that Barney Thlocco was enrolled without evidence as to whether or not he was alive

on April 1, 1899. Pursuant to the ruling of the court, and saving its exception thereto, the Government then offered the testimony of the officials and clerks of the Dawes Commission showing under what circumstances the enrollment of Barney Thlocco was made, and which testimony shows that whatever information the Commission had as to Barney Thlocco was received at Okmulgee prior to the time of the listing of his name for enrollment, and that such information, if any in fact was received—and it is not of record—was not relied upon by the Commission and the enrollment of Thlocco was made *tentative only, subject to further investigation,* as were hundreds of others at that time, and that the reason for such tentative enrollment was to satisfy the objection of the Creek National Council and to induce it to ratify the agreement. At the conclusion of this evidence, the Government renewed its former offers, which were again rejected on the ground that the Government had not made out a case sufficient to impeach the "judgment" of enrollment, and dismissed the bill. From such decree of dismissal, the Government appealed.

ASSIGNMENT *of* ERRORS.

The assignment of errors is set out in full in the brief of the appellant. We here call attention to those which involve the vital questions on this appeal and which are the subject of discussion in this brief:

The court erred in rejecting the following evidence of the witness Hecktor Beaver, offered by the complainant:

> " We offer to prove by this witness that he knew Barney Thlocco. He knew him for a number of years before his death. That the witness lived about a mile and a quarter northwest of the home of Barney Thlocco at the time of a small-pox epidemic in the Hilliby Indian settlement in the year 1899; that the witness remembers and will testify as to when Lee Patrick, the United States Indian Agent for the Sac and Fox Agency, which a g e n c y had its headquarters about six or eight miles northwest of the location of Hilliby settlement, established a pest camp at or near the home of this witness, and when a quarantine against the small-pox was established around the Hilliby settlement. And that prior to this time, which was in the latter part of January, 1899, Barney Thlocco died of small-pox. By this witness we further offer to prove that he the witness visited the home of Barney Thlocco the night before the death of Bar-

ney Thlocco, and at this time Thlocco was sick with the disease which the Indians thought was black measles. That several other Indians in the same locality were suffering from the same disease, but neither the witness nor the Indians in the locality knew the affliction to be small-pox until the establishment of the pest camp by the Indian Agent in January, 1899. That the lumber used to build the coffin for Barney Thlocco was taken from an old house belonging to the witness, and witness saw Barney Thlocco's grave in the Indian cemetery about 200 yards from the house of Barney Thlocco. That the witness saw Barney Thlocco's coffin on the porch of the house of Barney Thlocco. The witness will testify that the making of the coffin, the seeing of the same at the house of Barney Thlocco and observing the grave of Barney Thlocco was all before the establishment of the pest camp by Lee Patrick, the Indian Agent. Witness can and will further identify and fix the time by reason of the fact that several of the members of the witness' family died of this disease prior to the establishment of the pest camp and after the death of Barney Thlocco. That the witness will testify about the time the pest camp was established he visited the house of Barney Thlocco in company with one Jim Combest who was then engaged as a nurse for the Indian Agent in connection with the small-pox epidemic. That C o m b e s t took from this house on this occasion all the remaining members of the Thlocco family who were yet alive, and all of them were suffering from small-pox, these people being taken to the pest

camp. That at the time Thlocco was dead and buried. That about this time witness took Jim Combest to the home of Tuskegee Harjo who was suffering from the small-pox, and Combest took Tuskegee Harjo and the members of his family to the pest camp. Witness knows that Tuskegee attended the funeral of Barney Thlocco, and that Tuskegee Harjo died on the same night of his removal to the pest camp." *(Assignment No. 8.)*

The court erred in rejecting the following evidence which complainant offered to prove by the witness Hecktor Beaver and by the following other witnesses, to-wit: Figey Blueford, Ben Combest, Jim Combest, A. B. Comer, W. A. Christie, Martin Daugherty, Dan Dirt, J. J. Evans, Ben Hoter, Billy Johnson, Charlie Swift, Milannie, Thomas Vanderslice, Pete Washington, and other witnesses produced by the complainant, and by records and documentary evidence:

" That Barney Thlocco in whose name the patent was made in this case, died on or about the 10th day of January, 1899, at age of from forty-five to fifty years and prior to the 26th day of January, 1899; that Barney Thlocco was a resident of the Creek Indian settlement known as Hilliby, where he had resided a number of years prior to his death; that said settlement is situated in what is kown as Tuckabachie town, of

the Creek Tribe of Indians and of which Barney Thlocco was a member. That during the winter of 1898 and 1899 the small-pox broke out in the Hilliby settlement, which disease at that time was supposed and believed by the Indians to be black measles and was so believed by them to be black measles until the 26th day of January, 1899. That on the 26th day of January, 1899, Lee Patrick, the then Indian Agent of the Sac and Fox Agency near the Hilliby settlement, was directed by the Secretary of the Interior to take steps to eradicate this disease among the Indians; that Mr. Patrick made inquiry and found this disease to be small-pox, and established a pest camp, in the settlement, to which all the Indians afflicted with small-pox were removed; that the establishment of this pest camp was on the 26th day of January, 1899; that this pest camp was maintained until the eradication of the disease among the Indians in the spring of 1899; that Barney Thlocco died about two weeks before the establishment of this pest camp; that he was either the first or second Indian to die of this disease; that the first Indian to become afflicted therewith was Figey Blueford; that Barney Thlocco was a prominent Indian; that it was widely, generally and well known among all the inhabitants of this community that he died before the establishment of the pest camp on the date aforesaid; that a large number of the Indians, approximately seventy-five, in the community, died of the disease during the prevalence of this epidemic; that the official record of the small-pox camp kept by the

Indian Agent Patrick will and does show that only one of such Indians died after April 1, 1899; that the name of this Indian who died after April 1, 1899, was Osar-heneka; that the Indian Agent Patrick, who was then the Indian Agent of the Sac and Fox Agency, was an employee and representative of the Department of the Interior of the United States. That the following named Indians, to-wit: Tuskegee Harjo, Arch Johnson, Jimmie Deer and Sam Laslie attended the burial of Barney Thlocco, one of them having made his coffin and others of them having dug his grave and buried him; and that these same persons afterwards were taken with the small-pox and removed to the camp, and that all of them except Tuskegee Harjo died during the month of February, 1899, and that Tusekegee died January 27, 1899; that all of the members of the Barney Thlocco family, consisting of himself and three children, died of the epidemic about that time, except Thlocco himself, in the pest camp established in Hilliby shortly after the establishment thereof, and during the month of February, 1899, Thlocco himself having died at the time aforesaid; that Barney Thlocco's only living brother died during this epidemic in the month of February, 1899, after having been present at the death of Barney Thlocco and at the burial of Barney Thlocco. That this was the only small-pox epidemic that ever occurred in the Hilliby settlement, and that the epidemic left very few survivors in the settlement." *(Assignment No. 22.)*

The court erred in not permitting the complainant to introduce evidence in support of its allegation that Barney Thlocco died prior to April 1, 1899, regardless of the question as to whether or not the Commission to the Five Civilized Tribes in enrolling the name of Barney Thlocco, with the approval of the Secretary of the Interior, acted arbitrarily, and without any evidence, information, knowledge or belief as to whether or not he was living or dead on the 1st day of April, 1899. *(Assignment No. 30.)*

The court erred in rejecting certain evidence offered by complainant, to-wit: that portion of complainant's Exhibit 2, in words and figures as follows:

> " Stricken by order of Department, Dec. 13, 1906. (I. T. D. 22734-1906), Commissioner's File No. 55241-1906." *(Assignment No. 2.)*

The court erred in rejecting certain evidence offered by complainant, as follows: Complainant's Exhibit No. 7, consisting of a certified copy of the records in the office of the Commission to the Five Civilized Tribes, pertaining to the cancellation of the enrollment of the name Barney Thlocco as a Creek citizen by blood, the full substance of said records being as follows:

> " A letter dated August 25, 1904, written by the Chairman of the Commission to the Five

Civilized Tribes to the Secretary of the Interior, advising that the attorney for the Creek Nation had moved the right of Barney Thlocco to enrollment to be re-opened, and transmitting the affidavits of Wilson Knight and Barney Yahola, relative to the date of death of said Barney Thlocco, and recommending that said case be re-opened on the ground that said Barney Thlocco died prior to April 1, 1899, and that a rehearing be ordered;

" A letter dated September 7, 1904, from the Commissioner of Indian Affairs to the Secretary of the Interior, enclosing a report from the Commission to the Five Civilized Tribes, dated August 25, 1904, concerning the application of the attorney for the Creek Nation to have said case re-opened, and recommending that said motion be granted;

" The joint affidavit made August 9, 1904, of Wilson Knight and Barney Yahola, stating that they personally knew Barney Thlocco and that he died prior to April 1, 1899;

" A letter dated September 16, 1904, from the Secretary of the Interior to the Commission to the Five Civilized Tribes, granting the said motion to re-hear said case, and so advising said Commission;

" The testimony of Jones Bear taken by and before the Commission to the Five Civilized Tribes on October 21, 1905, wherein he testifies, among other things, that Barney Thlocco died in January or February, 1899, and prior to the

date upon which the Creek Land Office was opened, to-wit, April 1, 1899; and

" The testimony of Charley Simmer taken by and before the Commission to the Five Civilized Tribes on November 14, 1905, wherein he testified, among other things, that Barney Thlocco died in December, 1898, or January, 1899, and prior to the date upon which the Creek Land Office was opened, to-wit: April 1, 1899; the testimony of both said witnesses having been taken in the matter of the enrollment of Barney Thlocco, deceased, as a citizen by blood of the Creek Nation;

" A notice dated February 9, 1906, addressed 'To the heirs of Barney Thlocco, Arbeka, Indian Territory,' signed by the Acting Commissioner to the Five Civilized Tribes, notifying said heirs that on February 19, 1906, a hearing would be conducted in the matter of the right of enrollment of Barney Thlocco, deceased;

" A letter dated October 10, 1906, addressed to the Secretary of the Interior by the Commissioner to the Five Civilized Tribes, setting forth the various proceedings, beginning with August 25, 1904, had in connection with the rehearing of the right of Barney Thlocco to enrollment, and the various hearings conducted by the Commission, and the substance of the evidence received, and advising that it was conclusively established that Barney Thlocco died prior to April 1, 1899, and recommending that authority be granted for striking his name from the approved roll of

Creek citizens, opposite No. 8592, and transmitting the entire record in said matter; and

" A letter dated December 13, 1906, addressed to the Commissioner to the Five Civilized Tribes by the Secretary of the Interior, stating, among other things, that the recommendation to strike the name of Barney Thlocco from the approved roll, was concurred in by both said office and the office of the Commissioner of Indian Affairs, and stating that said name had been cancelled by the Department from said roll, and that the Indian Office had been directed to take similar action, and authorizing said Commissioner to the Five Civilized Tribes to cancel said name from the roll in his custody." *(Assignment No. 6.)*

The court erred in rejecting the following evidence offered by complainant: that portion of complainant's Exhibit No. 1, in the words and figures as follows:

" No. 1, stricken from approved roll by authority of Department, December 13, 1906,"

and to prove in connection with the introduction thereof that that entry was made on said exhibit before March 4, 1907, and immediately after the receipt of the letter of the Secretary of the Interior directing the Commission to cancel the enrollment of said name Barney Thlocco, which said letter forms and composes a part of the complainant's Exhibit No. 7. *(Assignment No. 27.)*

The court erred in rejecting the following evidence offered by complainant: that portion of complainant's Exhibit No. 2, in words and figures as follows:

> " Stricken by order of the Department, December 13, 1906,"

and in not permitting the complainant to show that the above quoted portion of said Exhibit No. 2 was placed on the official roll of citizens by blood of the Creek Nation, opposite the name Barney Thlocco, pursuant to the letter of the Department of the Interior dated December 13, 1906, and immediately after the receipt of said letter by the Commission and prior to the 4th day of March, 1907.

BRIEF *of the* ARGUMENT.

1. That Barney Thlocco was in fact living on April 1, 1899, was an essential prerequisite to his enrollment as a Creek citizen, and a condition precedent to his right to receive an allotment of land in said nation, under the provisions of the Act of Congress approved March 1, 1901. The evidence offered by the Government to show that Barney Thlocco died during the small-pox epidemic in January, 1899, and that the fact of his death was well and widely known in his community, was relevant to the issue, and was also competent and material evidence, and should have been admitted, and it was error to exclude the same.

2. There was no trial, controversy or judicial proceedings before the Commission to the Five Civilized Tribes upon the issue of the date of the death of Barney Thlocco, resulting in a judgment that he was entitled to enrollment as a person living on April 1, 1899, so as to conclude the Government in a suit to cancel the allotment and the patents therefor, especially as against persons who could suffer no injury thereby, and the court erred in so holding.

3. There was no final and conclusive adjudication in favor of the right of Barney Thlocco to be en-

rolled as a Creek citizen and to receive an allotment of land, which could not be attacked by the Government on the ground that he was not living on April 1, 1899.

4. The enrollment of Barney Thlocco and the approval of such enrollment by the Secretary of the Interior was one administrative act, and there was nothing before the Secretary of the Interior upon which he could exercise judicial or *quasi*-judicial judgment by way of reviewing the action of the Dawes Commission.

5. Barney Thlocco was enrolled by the Dawes Commission upon the presumption that having been living at the time of the taking of the census in 1897 and 1898, he was still living on May 24, 1901, when he was listed for enrollment. The evidence offered by the Government to rebut such presumption and to show that he was dead prior to April 1, 1899, was therefore competent and it was error to exclude it.

6. There was no legal or substantial evidence before the Dawes Commission on May 24, 1901, or at any time prior to the approval of his enrollment, that Barney Thlocco was living on April 1, 1899.

7. The Secretary of the Interior had authority, on December 13, 1906, to withdraw his approval of the enrollment of Barney Thlocco and to cancel such enrollment on the ground that he was not

living on April 1, 1899, upon the finding and report of the Dawes Commission to that effect, and after a hearing for that purpose upon that issue. Proof of such cancellation of his enrollment was competent and it was error to exclude such proof.

8. The right of the Secretary of the Interior to withdraw his approval of the enrollment of Barney Thlocco is not affected by the fact that no notice thereof was given to his heirs. The failure to give such notice would not divest them of their rights, if any they had, but the cancellation of the enrollment destroys the presumption which it would, if not cancelled, have afforded as *prima facie* evidence of his right to enrollment and puts the burden upon the defendants of proving that he was living on April 1, 1899.

9. The allotment, having been arbitrarily selected by the Dawes Commission without application therefor by any person, and the allotment certificate and the patents for such allotment having been issued in the name of Barney Thlocco long after his death, and never delivered, were void and did not operate to vest the title in his heirs.

10. The fact of the enrollment of Barney Thlocco was not in itself an adjudication of his right to be so enrolled, but if so, as contended by the defendants, then the court erred in holding that the same tribunal could not re-open the inquiry

and reverse its judgment, and it was error for the court to exclude the evidence offered by the Government that such alleged judgment had been reversed after full investigation and inquiry as to the date of the death of Barney Thlocco.

11. Neither the alleged heirs of Barney Thlocco nor their grantees or lessees acquired any title to the land involved, because such title is still in the Creek Nation, and in any case, those opposing the Government did not claim or plead that they are *bona fide* purchasers but simply asserted the validity of the proceedings relative to the enrollment of, and the allotment of the land in controversy to, Barney Thlocco.

ARGUMENT

The position of those resisting the cancellation of the patents is not the position of innocent third persons asserting vested rights acquired in reliance upon the action of the Commission to the Five Civilized Tribes in the enrollment of Barney Thlocco and in the issuance of a certificate and patents for the lands in controversy, for they do not plead that they are bona fide purchasers, but stand squarely on the proposition that the enrollment of Barney Thlocco and the issuance of the patents in question are conclusive of all the matters alleged in the bill, and are therefore immune from attack. Their theory is that the fact of Barney Thlocco's enrollment is *res judicata* of his right to be so enrolled and of the fact that he was living on April 1, 1899; that because of the act of enrollment itself, and the circumstances surrounding that act, they infer that there must have been, of necessity, some evidence of Thlocco's right to enrollment, and that whatever its quantity or quality, it was sufficient to satisfy the Commission, and the Government could not maintain this action, unless it showed affirmatively, by clear and convincing proof, that there was no evidence of any kind or character whatever on the question as to whether Barney

Thlocco was living or dead on April 1, 1899, or that the enrollment was obtained by fraud, extrinsic and collateral to the matters which they claimed were tried and adjudicated upon.

The contention of the Government is that Barney Thlocco was in fact not living on April 1, 1899, and that the contrary was never found or determined prior to his enrollment; that there was neither in fact nor in law an adjudication of his right to enrollment nor of the fact that he was living on April 1, 1899; that in a suit of this character, it cannot be inferred from the act of enrollment itself, on the theory that such a finding is necessary to support the enrollment, that such finding will be presumed; that the testimony submitted by the Government shows that there was no proof before the Dawes Commission amounting to legal and substantial evidence, that Barney Thlocco was living on April 1, 1899, and that even if there was, it could not conclude the Government or the Creek Nation, neither of which was a party to the proceedings, which were purely *ex parte*, at which the evidence, if any, was heard, nor to estop the Government or the Creek Nation from showing that such evidence was false; that there was no necessity, in order to maintain this action, of pleading or proving collateral or extrinsic fraud in the enrollment; that the allotment was arbitrarily made

and the patents issued to a person who was then dead, and that so far as his right to an allotment of Creek land was concerned, Barney Thlocco was a mere myth and the patents to the land were void.

Before discussing the legal propositions here suggested, we desire to state briefly the testimony of the Government relative to the circumstances under which the enrollment was made. The Government felt that it was its duty, in view of the ruling of the court, to obtain the testimony of all available persons intimately connected with the enrollment of Creek citizens, and these persons testified substantially as follows:

EDWARD MERRICK:

This witness testified that the last two or three days before May 24, 1901, the date of the ratification by the Creeks of the Original Creek Agreement, the Commission listed for enrollment between 200 and 300 names per day; that up to the time that the enrolling party went to Okmulgee, there were a great many names on the 1890 and 1895 authenticated tribal rolls, unaccounted for, that is to say, no one had appeared at the office to ask for their enrollment, and that while at Okmulgee they brought in a great many applicants by means of wagons and teams that had been sent all over the country. There was a

provision in the agreement that no names should be added to the roll after its ratification and the impression was that it was necessary that all persons who appeared on the tribal rolls unaccounted for should be listed on a card

> *"so we could say they were listed prior to the ratification of the agreement, and in order to do that the Creek Council held off two or three or four days acting on the agreement until we had gone through both the 1890 and the 1895 rolls."* (Tr., p. 67.)

That the Commission was endeavoring on that occasion to put on cards the names of all unaccounted for citizens. The plan of the Commission in preparing the final roll was to place on the so-called schedule approximately 500 names and to transmit each schedule one at a time to the Secretary of the Interior for approval, and the so-called schedules, when approved, became the final roll. The witness further testified:

> " I would have to say that after Thlocco's name was listed on the card at Okmulgee on May 24, 1901, there was some investigation upon the question as to whether or not he was living or dead on April 1, 1899, *because it was a prerequisite to their right to enrollment that they be living on that date, and the Commission would have to be satisfied, or have information of some kind that he was living on that date.*

We were, however, often imposed upon. The handwriting on the Thlocco card made in 1901 is mine. It was made up in its entirety in Okmulgee on May 24, 1901, and was completed on that day. Some cards were not completed that day. In cases where cards were completed at that time, I don't think that was *an end of a determination of the question as to their right to enrollment*, but it was the end of the listing for enrollment, but ofttimes I remember we would get information afterwards, and before transmission of the final roll, that the person so listed was not so living on April 1, 1899, and in cases where we had filled out all the information on the card the matter of the right of the person, whose name appeared thereon, to enrollment was treated as settled unless we obtained further information which somebody voluntarily gave, but where said cards were not so completed, we afterwards sent out identification p a r t i e s to make inquiries, and I couldn't say that after May 25, 1901, there was any investigation in Thlocco's case, but I would say that the conclusion that we came to over at Okmulgee had not been changed by any one appearing or offering any evidence to the contrary.

" We knew that Thlocco was dead, and we *apparently were satisfied* at Okmulgee that he was living on April 1, 1899, but that *don't preclude further investigation. I was satisfied of that before I prepared the schedule, and submitted it to Mr. Bixby, but I don't know what satisfied me.* We would ask Town Kings and Town Warriors when they came in, and anybody

else, if they knew this or that, and most of the Creeks had selected their allotments before that time and we could tell whether they were living or dead on April 1, 1899, by the allotment records, for they began tentative allotments on April, 1899. There were no approvals of enrollments until some time in 1902." (Tr., pp. 68-69.)

"* * * Q. Isn't it a fact, Mr. Merrick, that you took the name of Thlocco from the old census card when you made up this card?

" A. I used the old census card I am certain of that, yes, sir, for that gave me the parentage and degree of blood. I will have to say that in view of the fact that the age on the old census card is given as 40 and that on the new is 35, and the post-office is different, that *I must have had some information* other than the old census card. The old census card was secured, I think, by Mr. Hopkins, when he was out in the field and they were made for persons then living. On the last three or four days before May 25, 1901, people, the Town Kings, the Town Warriors or other prominent Creek citizens, would appear in behalf of others and ask to have certain persons listed, but if no one appeared then, we took these tribal rolls and just took the name that appeared on the roll and the tribal enrollment and made a census card for them, but where we had an old census card, we had other data, we had the parentage, the blood and the age. As a general rule, the cards we made up then were completed because we had that information

from the old census cards, but I would think that in all cases where the card was completed in every respect over there that some one must have appeared, because those old census cards were made prior to April 1, 1899, and we didn't know whether they were living or dead. I can't remember whether I personally learned anything about whether Thlocco was living or dead on April 1, 1899, I don't remember it if I did." (Tr., p. 70.)

" * * * Q. Now, let me ask you this: Did you enroll during that two or three days there when you were listing these names that were unaccounted for, did you list those names for enrollment when you were satisfied they were living on April 1, 1899, or did you list them when you were not satisfied they were dead on April 1, 1899?

" A. We listed every name unaccounted for that was on the 1890 and 1895 rolls. A great many of them we didn't know whether they were living or dead and we didn't know when they died, if dead.

" Q. Now, it was under that circumstance that you listed the name of Barney Thlocco?

" A. He was one of the unaccounted for. The descriptive features which we placed on the census cards were the age, the blood, tribal enrollment and parentage.

" Q. Now when you competely filled out a card, it meant that you had determined that the person was entitled to enrollment, did it not?

" A. Not necessarily determined that he was entitled to enrollment, but determined the fact that we thought he was entitled to be enlisted for enrollment." (Tr., p. 73.)

" * * * My explanation of my failure to note on the final census card of Barney Thlocco the fact of his death would be that at that time we had no proof of death and regular affidavit made on the form that we had. I don't think that during the process of enrollment we made a notation on a card showing the death with ink. Oftimes we would make a note with a soft lead pencil on there; just verbal information, but when we noted on the card the date when he died, I think in all cases we had a proof of death in affidavit form. I don't think we would put the notation on there with ink until we had some proof, until we got the affidavit, I think that was the practice. It is possible that for want of the affidavit stating the exact time of his death, we didn't make any notation on the card, and I think that is in accord with the practice."

On redirect examination, said witness testified:

" Q. In other words, you wanted proof of death?

" A. Yes, sir, we wanted proof of death when we made the notation on there.

" Q. So that the question could be determined?

" A. Yes, sir." (Tr., p. 89.)

PHILLIP B. HOPKINS:

This witness, who was Chief Clerk and Chief Attorney for the Dawes Commission, testified that he was one of the party sent by the Commission to Okmulgee, just prior to the ratification of the Original Creek Agreement; that there had already been a large number of citizens enrolled and that the Commission proceeded with the work of enlisting for enrollment, citizens, or names upon the tribal rolls, who had not been disposed of, so far as being listed for enrollment was concerned, and that there were a number at that time who had made no appearance and for whom no application for enrollment had been made. He further testified:

> " In considering the proposed Creek Agreement, the question was raised by officers of the tribe that the first sentence of section 28 might be construed to mean that the roll we were making could not be added to after the date of the ratification of the treaty, that sentence reads: 'No person except as hereinafter provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.' As a result of the possibility of their construction being correct, we entered *tentatively* on the census card, or census cards, the names that appeared upon the tribal rolls that had not been listed for enrollment; they were so listed on the regular cen-

sus cards. When we finished listing for enrollment those we did have information about, we had some that we did not have information about, and we listed them because of the possibility of the construction of the treaty that some of the council members contended for. The practice of the Commission and the rule had been that all adults should appear in person and apply for enrollment. We accepted applications by one person for another only in the case of minor children, from parents and guardians, and we had continued the practice up to that time. For practically 60 days we had had different parties out using every means at our disposal to get these people to come in for enrollment and just prior to the ratification of this agreement, if I remember, there were still a number who had not appeared, whose names did not indicate that they appeared and their names were entered on one of these new census cards, the regular census cards. Officers of the Creek Nation said 'what is to become of those who haven't yet appeared?' and that if the agreement is ratified some people contend that they never would have a chance to get on the roll and that they would like to have their names entered up. Just what information we got as to those people, I can't tell now, but there were representatives of the Creek Nation present and the Creek attorney; the Town Kings were all there at that meeting, and we endeavored to get all the information we could; if there were any names concerning whom we couldn't get information at that time I can't recall it; still, it might be possible. If there had

been a few names or a number of names on the tribal rolls concerning whom we couldn't get information from those who were present at that time, officers of the tribe, members of the council or the Creek attorney, it may be possible to relieve their doubt as to whether they might be listed afterwards, that we entered even those on the cards for further investigation. I presume that there were a number of names entered on the cards just before the ratification of the treaty under the circumstances I have just related. (Tr., pp. 77-78.)

" * * * The notation on the 1895 Tuckabachie Town roll opposite the name Barney Thlocco, 'Died in 1900' is in my handwriting. Such notations as that came to be made on the tribal rolls because prior to the Original Creek Agreement, ratified May 25, 1901, and while we were working under the Curtis bill, we were not authorized to enroll deceased Indians and were only enrolling living Indians. (Tr., p. 78.)

" * * * With reference to the notation 'Died in 1900,' placed opposite Barney Thlocco's name on the 1895 tribal roll, I would say that evidently somebody gave me the information upon inquiry about Barney Thlocco, and possibly in the examination of this roll with other names, that he had died in 1900. I don't know who may have given me that information. I don't know what use was made of the notation, but I know it was intended that when the Commission came to pass on that name for final record on the roll that an inquiry should be made as to when Thlocco

died or whether he was dead and get the proper death affidavit and death proof. (Tr., p. 78.)

" * * * The old census card was intended to be a record of the applicant for enrollment; the new census cards were not made up from the old cards, but the latter were referred to at times where there was doubt as to the number of children in the family or we wanted to get some additional information, for the rule after April 1, 1899, was that all people should appear in person, and make application for their enrollment and allotment, except in the case of minors, and we did not copy the new cards from the old cards unless there was no application or appearance made for them. I think it must have been after the work was along toward completion that we had some of the clerks check the old cards with the new ones, mainly to avoid duplication of names, for when we were in the field and had no tribal rolls whatever to guide us the Indian name was frequently given by a full blood or by somebody representing another, when, as a matter of fact, the town kings had been carrying them on the tribal rolls under their English or school names. In each case, however, a new census card was supposed to be made and the old census card was not the thing from which the final roll was made." (Tr., p. 79.)

ED HASTAIN:

This witness testified that he was in Okmulgee in May, 1901, aiding in the work of enrolling Creek citizens. His testimony in part is as follows:

" All the names that appeared on the 1890 and 1895 tribal rolls that had not been listed for enrollment were listed for enrollment there prior to May 25, 1901, is my recollection. The occasion for enlisting them was in order to satisfy the Creek Council who were to vote upon the ratification of the Creek Agreement, because some of them feared that if they ratified this agreement, there might be some citizens who were not enrolled and under section 28 of that treaty the Commission would not have authority to later enroll them. I assisted in making up the census cards on that occasion and there were approximately two thousand filled out during that month."

" Before May 25, 1901, there were a large number on the tribal rolls who had not been listed for enrollment, and we placed those names on census cards *without a determination of the question as to whether they were living or dead on April 1, 1899; we had no information as to that.* When we enrolled a deceased person we made a memorandum on the bottom of the census card that he was dead, giving the date, or if we had a death affidavit, we would say 'see death affidavit attached hereto or in jacket so and so.' If we didn't have a death affidavit, we simply made the memorandum in ink." (Tr., pp. 84-85.)

" * * * There were two classes of cases at the Okmulgee meeting, one where we were satisfied on evidence and the cards were left incomplete, and where we were not satisfied we subsequently

conducted an investigation to determine from evidence the right to enrollment. I was clerk in charge of the Creek enrollment division prior to the time we were at Okmulgee and subsequent thereto up until the time of my resignation and during that time I investigated as far as I could these incomplete cards and completed the enrollment; however, during the time we were at Okmulgee, we had a large force on that work and I did only a portion of that enrollment." (Tr., p. 86.)

" * * * I think we must have had in mind prior to May 25 the question as to whether citizens were living or dead on April 1, 1899, because the agreement had been enacted by Congress and was pending for ratification by the Creek Council, and we knew what was in that agreement, and we were framing our work so that if it was ratified, we should not have it to do over again. I am sure we did that, and it is my recollection that where we found that a person was dead at that time and that he was living on April 1, 1899, *that fact was noted on the census card.*

" Q. Now, if you didn't have information on that subject, and you completed a card there, you treated that person as living at the time you made the card?

" A. Yes, sir.

" Q. And enrolled him as a living citizen?

" A. Yes, sir." (Tr., pp. 87-88.)

JOHN G. LIEBER:

This witness testified that he was a member of the field party at Okmulgee in May, 1901.

" On the last two days before the treaty was ratified we didn't consider it necessary in order to complete a card, showing identification of a citizen, to show on that card whether he was living or dead. The date for the ratification of the treaty had been agreed upon among the members of council, that is, May 25, 1901, and the Commission found that there was a large number of people on the Creek tribal rolls who had not been accounted for and something had to be done to preserve their rights for them if they had any and were living, so the last two or three days before the treaty was ratified, we took the 1890 and the 1895 rolls and put everybody on a census card who was on these rolls unaccounted for, unless we had information at that time that they were not entitled to enrollment. This was done on the theory that the treaty provided that no person could be enrolled after the ratification of the agreement. *We put them on because of the theory that if they were not entitled to enrollment they could be stricken from the roll afterwards upon investigation as to whether or not they were living on April 1, 1899, then if any investigations were made as to whether they were living April 1, 1899, or not, and that fact determined by the Commission it would either have appeared on the census card, or if sworn testimony was taken, it would have been transcribed*

and the record preserved, that was the universal rule and practice of the Commission. I don't remember of a case where there was a contest as to citizenship rights but that testimony was taken and reduced to writing. In cases where there were trials and contests, evidence was taken and preserved; in cases in which there was no trial or hearing of contest, and where there was no evidence preserved, the record was made up by noting on the card in ink if they enrolled a deceased citizen. If they knew at the time the roll was made that he was dead, it would be noted on the card in ink. If the census card was complete and contained no notation that the citizen was dead, that would indicate that he was living at the time the card was made; the fact that he was on the roll and there was no notation made that he was dead, then he was presumed to be living. I don't mean to say that that notation was made on the tribal roll; it was made on the census card.

" I have no recollection at this time about the enrollment of Barney Thlocco at Okmulgee, that is no independent recollection of that enrollment. The notation in pencil opposite his name, 'died in 1900,' on the 1895 tribal roll, I have seen. I probably saw it at Okmulgee at the time he was enrolled there, and I saw it again today. Such a notation as that on the tribal roll meant that the clerk, in making the enrollment should be on his guard and make inquiry; that is all it meant. It meant that somebody had furnished, in that case, Mr. Hopkins, information that that party was dead, or whatever notation was made on the roll, but it simply served to put the Com-

mission on their guard, and suggested further inquiry, further investigation. Looking at the census card of Barney Thlocco and eliminating these red lines, which were put on there in 1906, there is nothing on that card to indicate whether he was living or dead on May 24, 1901, nor to indicate whether or not an investigation was made afterwards as to his death. I want to modify that by saying that the card itself as made out would indicate that he was alive on May 24, 1901, when you eliminate the notation 'No. 1 stricken from approved roll by authority of Department December 13, 1906'." (Tr., pp. 90-91.)

" * * * Q. Now could you tell whether or not the clerk in making up this last card got some additional information over and above what was on the first card?

" By Mr. Davidson: We object to that as purely speculative.

" By Mr. Stuart: Your honor, I am cross examining this witness.

" By the Court: They are cross examining.

" By Mr. Davidson: Exception.

" A. Yes, he certainly must have. That indicates to me that the man making out this last census card got some information some place.

" Q. As a matter of fact, Mr. Lieber, this card shows that the man made an investigation independent of the first census card, don't it?

" A. Judge, I will say that on the date, the 24th day of May, and the day before that, there

was no investigation made of anybody's enrollment except information that was voluntarily given there by the Town Kings or somebody that was present. We hadn't time to investigate.

" Q. Well, then, I will leave out the word investigate. I will say didn't he get some evidence?

" A. Yes, he got s o m e information from somebody.

" Q. He got then, some information, independent of the first census card and by that information, independent of the first census card, he made out the last census card, didn't he, Mr. Lieber?

" A. Yes, sir." (Tr., pp. 92-93.)

" * * * The discrepancy between the old census card and the new census card in the matter of age and post-office address which indicates that information had come to the party conducting the enrollment work does not indicate that any information had come as to Thlocco's death. All I know as to the making of the final rolls that went to Washington is as to how they were made. I did not assist in making the final rolls." (Tr., p. 94.)

TAMS BIXBY:

This witness was a member, and chairman, of the Dawes Commission at the time of the enrollment of Barney Thlocco. He was at Okmulgee with the

enrolling party in May, 1901. Referring to the Government's Exhibit No. 1, being the census card on which the name "Barney Thlocco" appears, the witness testified:

> " We had field parties out all the time and they were instructed to report on these facts from time to time as to when men died and all about it. We spent thousands and thousands of dollars getting that information. We kept no record of testimony, only when there was supposed to be a contest or likely to be, outside of that on the cards. We acted on the best information we could get.
>
> " Q. Sometimes it was hearsay, sometimes direct, sometimes from the town king, sometimes from inhabitants near the party, sometimes report made by your field men? You took the best information you could get?
>
> " A. We had the assistance of the best men in the tribe as well as our own field parties."

On redirect examination, said witness testified substantially as follows:

> " Q. How would that information get to your Commission for consideration?
>
> " A. Why, frequently, we heard it ourselves. I heard a great deal of it.
>
> " Q. Suppose you didn't hear of it?
>
> " A. Then we took the judgment of the clerks on the cards. Unless it was called to my attention or to the attention of some Commissioner.

" Q. I believe you answered c o u n s e l that many thousands of dollars was spent by your Commission in sending parties out to obtain information?

" A. Yes, sir.

" Q. You, of course, could not carry their reports in your mind?

" A. No, we did carry a good many of them.

" Q. Why, did you have to, Mr. Bixby? State whether or not it is true that you required all of those persons to submit to your Commission the written result of their investigation?

" A. Frequently only a memorandum; and frequently it was made by full-blood Indians who couldn't write English or couldn't take shorthand reports and we could get nothing from them but verbal reports.

" Q. Evidence gathered in this manner—how did that information get to the Commission?

" A. Frequently it was reported to the clerks and frequently to the Commissioners.

" Q. Verbally?

" A. I took some of it myself.

" Q. In the Barney Thlocco case, did you take any?

" A. I have no recollection about the Barney Thlocco case whatever. I haven't the slightest recollection about it." (Tr., pp. 101-102.)

" * * * As a matter of fact when I would take this card I would have the card and the clerk would have the schedule. When I took the card

I went over it several times with the clerks and would find out from the clerk all the information that he had with reference to that card several times. I expect I have talked with the clerks about every card more than once." (Tr., p. 103.)

This testimony establishes certain things:

1st. That Barney Thlocco, whose name appears on the 1895 tribal roll, had been ascertained to be living in 1897 or 1898, when the old census cards were made.

2nd. That some information, prior to the passage of the Original Creek Agreement had been furnished that he was dead and that he died in 1900, which information was placed on the tribal roll in the form of the following notation: "Died in 1900."

3rd. That at the time this notation was made and the reason for it, was that under the Curtis Act (July 28, 1898), the Commission was authorized to enroll living persons only, and which notation served to put the Commission on inquiry as to the fact suggested, but was not a finding or determination of that fact.

4th. That there was no contest, controversy or hearing relative to the time of Barney Thlocco's death, or whether he was in fact dead, and that in

truth he was listed for enrollment on May 24, 1901, upon the presumption that he was then alive.

5th. That the name of Barney Thlocco was listed tentatively on May 24, 1901, and subject to further investigation, in order to satisfy the doubts of the Creeks, who delayed ratification of the agreement for that purpose.

6th. That neither at the time of such listing of his name for enrollment, nor prior to the making up of the schedule containing his name and submitted to the Secretary for his approval, was there any determination, other than the act of enrollment itself, that Barney Thlocco was living on April 1, 1899; that there was no issue on that fact and no evidence taken or heard, except that the officers and clerks of the Dawes Commission inferred and concluded that some information was obtained relative thereto; otherwise, according to the custom and practice of the Commission, he would not have been enrolled.

I.

Under the issues of fact made by the bill and answer, the evidence offered by the Government to show that Barney Thlocco died prior to April 1, 1899, was relevant.

The fundamental and vital facts alleged by the bill are that Barney Thlocco, who was enrolled by the Dawes Commission as a Creek citizen by blood, died in the beginning of the year 1899, and prior to April 1, 1899, and was, therefore, not entitled to enrollment or to receive an allotment of land in the Creek Nation; that there was no hearing, contest or controversy by, or investigation before, the Dawes Commission as to his right to be enrolled and that no notice was given to the Creek Nation or its officers of the Commission's intention to enroll him. The answer denies that Barney Thlocco died prior to April 1, 1899, but alleges that he was living on that date, and that the Commission, in enrolling him, acted in accordance with the law, and upon evidence which they found to be sufficient in law and in fact to authorize his enrollment. By this answer, we submit, but a single issue of fact was tendered, whether Barney Thlocco was living on April 1, 1899, the Government denying it, the defendants affirming it. Under the pleadings there was no other issue of fact in

the case. The bill admits his enrollment and necessarily admits all the presumptions which the enrollment carries with it, but the bill also alleges that there was no hearing, contest or controversy about the date of his death; that there was no such issue or trial of that issue, and that such enrollment was purely *ex parte* and without notice to the Creek Nation. These allegations are not denied by the answer, and are, therefore, admitted. The allegation in the answer that the Commission did not make a mistake but acted in accordance with the law, is, of course, stating a mere conclusion. The allegation that the Commission did not act without evidence, but that it enrolled Barney Thlocco upon evidence which was satisfactory and sufficient in law and fact, is not a denial that the proceedings before the Commission were wholly *ex parte*, and of course, do not amount to an assertion that there was a contest, hearing or trial between adversary parties resulting in a judicial finding and judgment on the issue of Thlocco's death. The Government offered to prove that Barney Thlocco had died prior to April 1, 1899, and singularly enough, the defendants objected to any evidence in support of the issue of fact which they themselves had tendered by their answer. That such evidence was admissible as relevant to the issue thus made is perfectly clear, without argument to support it.

There was, prior to his enrollment, no adjudication in the applicable sense of the term, that Barney Thlocco was living on April 1, 1899.

The defendants contend and the court took the same view of the matter that to admit the evidence offered by the Government would be to re-open and re-try an issue once determined and disposed of; that the date of the death of Thlocco to which the evidence was directed had been adjudicated by the Dawes Commission in favor of his right to enrollment, and that the Government was concluded thereby. The trouble, of course, with this position is that no such issue in fact was ever tried, and both the court and counsel failed to distinguish between those proceedings which are *ex parte* and those which are adversary, upon a disputed issue of fact and which result in a binding judgment conclusive in its character and effect.

That the Dawes Commission possessed *quasi* judicial powers may be conceded, but that it exercised such a power in the enrollment of Barney Thlocco we deny. In the first place, the Commission did not act as a body, or sit as a tribunal at any time in respect to his enrollment, or his right to be enrolled. Practically all of the judicial opinions relied on by the defendants, in which the doctrine is announced, were in cases in which the entire Commission sat as

a body, or at least conveyed that idea, to hear evidence and give judgment thereon. The great majority of questions, and particularly as to an individual Indian's right to enrollment, or to a particular allotment, were heard before an individual Commissioner in a purely administrative way. Often such matters were left to the decision of subordinate clerks. No evidence was taken and preserved of record and the questions were determined in some instances upon information of any kind that might come to the Commissioner or clerk, without the sanction of an oath, and with no assurance that it was correct. In the case of the enrollment of Barney Thlocco, the only Commissioner who seems to have had anything to do with the matter, was Tams Bixby, the chairman of the Commission. He testified that in preparing the schedule for submission to the Secretary of the Interior, he talked with the clerks and got whatever information they had, very often taking the judgment of such clerks if he himself had not personal knowledge. In the second place, there was no formal inquiry conducted by the Commission or by any Commissioner or clerk as to whether Barney Thlocco was living or dead on April 1, 1899. No issue was framed or determined. There was no judicial finding of fact nor judgment upon that fact. Before there could have been a finding of fact and a judgment and decision based on it, the fact must have

been in issue. In *Miles* v. *McCallan,* 3 Pac. 610, it was said:

> " A finding of fact is the determination of a fact by the court, which fact is averred by one, and denied by the other, and this determination must be found on the evidence in the case. Such facts as are properly averred on the one side, and properly denied on the other, constitute the issue in the case. All findings outside of these issues are of no legal force or value."

The enrollment of Barney Thlocco was upon *ex parte* proceedings and was purely an administrative or executive decision. The record shows this to be a fact and the defendants admit it in their answer by failure to deny the allegations of the bill in that respect.

In *United States* v. *Minor,* 114 U. S. 233, in speaking of the character of proceedings before the Land Department, the court said:

> " In nine cases out of ten, perhaps in a much larger percentage, the proceedings are wholly *ex parte.* In the absence of any contesting claimant for a right to purchase or secure the land, the party applying has it all his own way. He makes his own statement, sworn to before those officers, and he produces affidavits. If these affidavits meet the requirements of the law, the claimant succeeds, and what is required is so well

known that it is reduced to a formula. It is not possible for the officers of the government, except in a few rare instances, to know anything about the truth or falsehood of these statements. *In the cases where there is no contesting claimant, there is no adversary proceeding whatever.*

" * * * *It needs no other remarks than those we have already made, as to the nature of the proceedings before the land officers, to show how inappropriate this language is to such a proceeding. Here no one question was in issue. No issue at all was taken. No adversary proceeding was had. No contest was made. The officers, acting on such evidence as the claimant presented, were bound by it and by the law to issue a patent. They had no means of controverting its truth, and the government had no attorney to inquire into it. Surely the doctrine applicable to the conclusive character of the solemn judgments of courts, with full jurisdiction over the parties and the subject matter made after appearance, pleadings and contests by parties on both sides, cannot be properly applied to the proceedings in the land office in such cases.*"

In *Mill* v. *Brown*, 54 Fed. 987, it was held that decisions of the Land Department must not only be based on legal evidence, but upon some formal inquiry or trial at which the parties affected have a fair opportunity of presenting evidence. One of the last cases on this question is that of *Washington Securities Co.* v. *United States*, 234 U. S. 76, which was

a suit to cancel certain patents under the provisions of the Homestead law. The court said:

> " It is contended also that the proceedings resulting in the patents were not *ex parte* but adversary; that the land officers found the lands to be agricultural in character, and that this finding was conclusive upon the Government. No doubt these officers found from the proofs submitted to them that the lands were agricultural and not coal lands, for that was a prerequisite to issuing the patents, but the proceedings were not adversary in any true sense of the word. The applications and proofs of the entrymen were strictly *ex parte*. The Government was not called upon to make any adverse showing, no issue was framed, no hearing was had, and no one represented the Government save in the sense that the land officers did so."

It was urged that the Circuit Court of Appeals for the Eighth Circuit in *Kimberlin* v. *Commission*, 104 Fed. 653, and kindred cases, has held that the acts of the Dawes Commission, in enrolling applicants, were judicial and that the act of enrollment was entitled to all the force of a judgment. That is true where a collateral attack is made upon such judgment. The *Kimberlin* case was an application by Mary Jane Kimberlin for a writ of mandamus to compel the Commission to the Five Civilized Tribes to enroll her as a citizen of the Chickasaw Nation,

upon certain facts disclosed by her complaint. In the course of its opinion, the court quoted from the Act of June 10, 1896, conferring authority upon the Commission to *hear and determine* the application of all persons who applied to them for citizenship in any of said nations, and *after such hearing*, they shall determine the right of such applicant to be so admitted and enrolled, and that in the performance of such duties, the Commission should have power and authority to administer oaths, to issue process for and compel the attendance of witnesses, to send for persons and papers and other evidence, and to use every fair and reasonable means within their reach for the purpose of determining the the rights of persons claiming s u c h citizenship. The court called attention to the subsequent acts authorizing the Commission to continue the authority conferred on it, and stated that it was under the provision of these Acts of Congress that the Commission heard the claim of Mary Jane Kimberlin, and *decided, after hearing and determining the merits* of her application, that it could not enroll her as a citizen of the Chickasaw Nation. There was some contention as to whether her application was filed in time, but, regardless of that question, the court said:

> " Conceding, however, but not deciding, that the application of the plaintiff in error was in time to entitle her to a hearing and decision, that

the facts which she alleged were admitted, and that it was the duty of the Commission to hear and decide the question of her right to citizenship, according to the law and the very right of the matter, the power and duty of the courts below and of this court are no less certain. It is conceded that the Commissioners are executive officers. It is not their sole or chief function to hear and determine controversies between contending parties. Nevertheless, in the determination of the citizenship of the parties who apply to them for membership in the Five Nations, they are vested with judicial powers by Acts of Congress. They have authority to compel the attendance of witnesses, to send for persons and papers and hear evidence, 'to use every fair and reasonable means within their reach for the purpose of determining the rights of persons claiming such citizenship' and above all they are empowered 'to hear and determine the application of all persons who apply to them for citizenship.' This grant of power is plenary. It vests the authority and imposes the duty upon this Commission to hear and decide every question of law and of fact which is material to the right of the applicant to enrollment as the citizen of a nation. Take the case at bar. The facts are conceded. But do these facts entitle the applicant to enrollment as the citizen of the Chickasaw Nation? Does the provision of article 38 of the Treaty of 1866, that 'every white person, who, having married a Choctaw or Chickasaw, resides in said Choctaw or Chickasaw Nation * * * is to be deemed a member of said nation,' apply to those who,

like the plaintiff, were married subsequent to the adoption of the treaty? Are the amendments of the laws of the Chickasaw Nation made by its legislature in 1887 and 1890 which by their terms prohibit the plaintiff from acquiring any rights of citizenship in that nation by her intermarriage with the white widower of a deceased Indian woman, void, in the face of the treaty, or are they consistent with its provisions and with the Acts of Congress, and fatal to the claim of the plaintiff in error? The consideration and decision of these questions were indispensable to the determination of the plaintiff in error's right to the citizenship she sought, and the Acts of Congress intrusted their consideration and decision to the judgment and discretion of the Commission and not to those of the courts. Under these Acts of Congress, the Commission to the Five Civilized Tribes is a special tribunal vested with judicial power to hear and determine the claims of all applicants to citizenship in the Five Civilized Tribes, and its enrollment or refusal to enroll the applicant in each particular case constitutes its judgment in that cause. In the case before us, this tribunal has heard and d e t e r m i n e d the claim of the plaintiff. Whether its decision was right or wrong is immaterial in this court, and that question will not be considered. Congress saw fit to entrust to the judicial discretion of the Commission the determination of the application of the plaintiff in error, and of every question of law and of fact which that decision involved. Under the settled rules to which attention was called in the

opening of this opinion, no court has jurisdiction by the use of the writ of mandamus, to substitute its own opinion for that of the tribunal, to which the law intrusted the decision of these questions, to control the judicial discretion of that tribunal, to correct its errors or to reverse its decision. The judgments of the courts below were right, and they are affirmed."

Nunn v. *Hazelrigg*, 216 Fed. 332, was a suit in ejectment in which the right of one Tenadan to be enrolled as a Creek by blood, while in fact a negro, was raised by the answer of the defendant. He had taken a deed from the allottee, knowing her to be a negro, and without knowledge of the fact that she had been enrolled as a Creek, a circumstance which, of course, affected the alienability of her allotment. It was held that her enrollment as a Creek by blood fixed her status as against *collateral* attack. This same doctrine was clearly announced in *United States* v. *Winona & St. Paul R. R. Co.*, 67 Fed. 948, in which it was said that a patent to the public land was impervious to *collateral* attack on the ground that the patentee was not entitled to it, but that such patent could be avoided in a suit in equity *directly* attacking the patent because issued erroneously.

There is certainly nothing in these cases to support the contention that the enrollment of Barney Thlocco was an adjudication of the fact that he was

living on April 1, 1899, which concluded the Government in this suit. There was no application for his enrollment; there was no formal inquiry or trial upon the issue whether or not he was living or dead on April 1, 1899; neither the Creek Nation nor the Government were present, except in the sense that the Dawes Commission represented the Government; there were no adversary parties; no witnesses were examined; if there was any evidence taken no one knows about it. There was nothing before the Secretary of the Interior when he approved that portion of the roll containing his name. In no sense could the enrollment be considered *res judicata* of his right to be enrolled or of the fact that he was living on April 1, 1899.

In *Iowa Land & Trust Company* v. *United States*, 217 Fed. 10 (known in Oklahoma as the *Hawkins* case), it was held that a finding by the Commission to the Five Civilized Tribes that a person was entitled to enrollment, and to an allotment of land, is not conclusive against the United States in a direct suit to cancel the patent. In that case, there was an application for enrollment, *and evidence was submitted in support of it.* The court held that the hearing before the Commission was purely *ex parte;* that neither the United States nor the Creek Nation was represented; that no issue was framed or tried; that

consequently there was no judgment which bound the Government in a suit to cancel the patent on the ground that the patentee was not living on April 1, 1899, and that the Government might show that the evidence submitted in support of the enrollment was false—precisely what the appellant offered to show in the case at bar. The trial court distinguished the *Hawkins* case from the case under discussion on the ground that in the *Hawkins* case fraud was alleged and proven, while in the case at bar there is no such allegation. There is no ground for this distinction. The acts for which a judgment may be impeached are those fraudulent acts extrinsic or collateral *to* the matter tried, and not intrinsic *in* the matter in which judgment was rendered.

—*U. S.* v. *Throckmorton*,
98 U. S. 68;
Story's Eq. Jur., 1579.

That is the only kind of fraud which a court of equity will recognize as affording relief against a judgment so procured. The fraud pleaded in the *Hawkins* case, which was a direct attack on the patents, was not extrinsic or collateral fraud, and indeed this was the very ground upon which the defendants in that case insisted that the court could not grant the relief prayed for in the bill. The court held, however, that the Government was entitled to its relief notwith-

standing, because in a suit of that character, such fraud did not have to be pleaded or proven, and that all that was necessary was to plead and prove that the person whose allotment was sought to be cancelled did not belong to the class entitled to an allotment in the Creek Nation, because he died prior to April 1, 1899. This is precisely the case at bar. Fraud, therefore, as a ground for equitable relief, was not in the *Hawkins* case at all. It was alleged there, in effect, that Chester Hawkins was fraudulently enrolled as a living person on April 1, 1899, when in fact he was dead on that date. The allegations of the bill in the case at bar are in effect that Barney Thlocco was erroneously enrolled as a living person on April 1, 1899, when in fact he was dead prior to that date. There is not a particle of difference in the effect of the allegations. In both cases there was fraud in the sense of a wrong done to the Creek Nation by reason of the enrollment of, and the allotment of land to, a person never entitled to that right. The allegations amount simply to saying that the evidence upon which the enrollment was made was false. In both cases the issues seem to us to be identical.

It cannot be possible that the motive of the person upon whose information the Commission relied in making the enrollment, determines the right of

the Government to the relief prayed for. One may give information unintentionally false, or he may unintentionally, but with a corrupt motive, state that which is really true. In *Coe* v. *Aiken*, 61 Fed. 31, Judge PUTNAM, in a case involving a decision by the Railroad Commissioners of New Hampshire, with reference to the location of lands as made by a railway company said:

> "There is no doubt in my mind that a court of equity may set aside the action of a tribunal of this character, either in whole or in part, if it is fraudulent in its nature or essence, or was fraudulently obtained. It may even go further, and, for the same reasons, set aside the judgment of a judicial tribunal. This is a fundamental principle of equity law. But it is not enough for that purpose that the parties who brought about the adjudication had a fraudulent or illegal intent. It must be shown that the tribunal itself proceeded fraudulently or in excess of its powers, or that it committed a gross mistake, or that the adjudication was obtained by fraudulent methods practiced upon or before the tribunal, as by false testimony. It is a well settled principle, that a just result, otherwise lawful, is not ordinarily affected by the fact that the parties who secured it entertained in their own breasts an illegal, fraudulent, or unauthorized intent or purpose. The law ordinarily judges of what was done by what was done, and not by the purposes of those who secured the result."

If the information obtained by the Commission had been that Thlocco was dead on April 1, 1899, and he had been denied enrollment on that ground, but later, say in the month of May of the same year, had actually appeared in the flesh, would it be said that his right to have the "judgment" denying the enrollment set aside, depended on the motive of the person upon whose testimony or information such judgment was rendered? C l e a r l y not. His physical presence at a later date is simply indisputable evidence that he was alive on April 1, 1899, and that, therefore, the Commission had erroneously and by mistake, denied him enrollment on the ground that he had died prior to that time. If then, proof that he was *alive* on that date, would be admissible to impeach a "judgment" that he was *dead*, why is not any competent evidence admissible to show that he was *dead* on that date, in order to impeach a "judgment" that he was *living?* It is enough that the testimony upon which he was enrolled was false *(Cornelius* v. *Kessell*, 126 U. S. 461), or that such enrollment was upon false suggestions *(Hughes* v. *United States*, 4 Wall. 232).

Conceding all that is claimed by the defendants with respect to the information or evidence which the Commission had before it on the question whether Barney Thlocco was living on April 1, 1899, it is not

even contended that there was such an adjudication on that question as is contemplated under the decisions. In their answer, the defendants allege:

> " And these defendants say that on the 1st day of April, 1899, the said Barney Thlocco was a Creek Indian by blood, and was entitled, under the Acts of Congress on this behalf, to be enrolled upon the Creek Roll of Indians, and was so enrolled by said Commission, created by an Act of Congress, in the discharge of their duties, and acting upon evidence satisfactory to them and sufficient in law and in fact to authorize said Commission in placing the name of said Barney Thlocco on said rolls."

The position was here assumed, and such was the argument, and also the view of the court, that the enrollment itself, regardless of the nature of the proceedings upon which it was predicated, was a judgment, conclusive upon the Government, unless it showed, not that the evidence, if any, upon which the enrollment was made, was false, but that there was no evidence whatever before it, either true or false. That such was the view taken by the court is evidenced by his ruling, excluding the offer of the Government to prove that one of the defendants, The Black Panther Oil & Gas Company, had alleged in its separate answer to the Government's bill the following:

> " This defendant admits that there was no controversy or contest of any kind put on before said Commission with respect to the enrollment of said Barney Thlocco, or his right to be so enrolled and in this connection, this defendant avers that there was no ground for any controversy or contesting the right of said Barney Thlocco to receive an allotment, his enrollment not having been challenged in any manner." (Tr., p. 116.)

In the mind of the court it was immaterial whether there was a formal inquiry or trial between adversary parties as to whether Barney Thlocco was living on April 1, 1899; it was wholly immaterial whether issue had been taken on that question, or whether an opportunity had been afforded the Creek authorities to dispute or inquire into the truth of whatever representations were made to the Commission. Such representations were admittedly made in *ex parte* proceedings, yet the Government is said to be bound by them because the Commission acted upon such representations. In other words, the proposition is, that the Government is not bound, if *no representations at all* were made to the Commission, but that if *any* statements were made, then the Government *is* bound, *no matter how false they may have been.* We may, of course, indulge in the presumption that the representations, if any there were, are *prima facie* true, but is the Government to be precluded

from rebutting that presumption by showing that such statements were false? The doctrine is wholly untenable. Nothing was adjudicated, because nothing was in issue. An adjudication certainly pre-supposes a controversy over the fact adjudicated.

The record clearly shows that there was no judicial determination that Barney Thlocco was living on April 1, 1899. The testimony of Edward Merrick, the clerk who prepared the schedule containing the name of Barney Thlocco and submitted it to Mr. Bixby, the chairman of the Commission, shows that the listing of Thlocco's name on May 24, 1901, was not an end of the determination of his right to enrollment, and that such listing did not preclude further investigation as to his status. Mr. Hopkins says that such listing was tentative. Mr. Hastain says that the names placed on the new cards on May 22, 23 and 24, and which included the name of Barney Thlocco, were placed on such cards without a determination as to whether they were living on April 1, 1899. Mr. Lieber testifies that if the Commission had known or determined that he was dead at the time they enrolled him, that fact would have been noted in ink as a permanent record in accordance with the practice of the Commission, and that the card made on May 24, 1901, does not indicate whether he was living or dead on April 1, 1899, nor

does it indicate that an investigation was ever made as to that fact. Mr. Bixby simply says that in preparing the schedules, he talked with the clerks and got whatever information they had, very often taking the judgment of such clerks if he had no personal knowledge. The Commission as a body, at no time acted in the premises. All the evidence shows that Barney Thlocco was listed tentatively for enrollment, on the theory that, not having been shown to be dead, he might still be living, and upon that presumption; that he was one of the great many so listed at that time, merely to satisfy the objections of the Creeks to the ratification of the agreement. If Barney Thlocco was judicially determined to be alive on April 1, 1899, when was such fact determined? Clearly not at the time of the tentative enrollment; otherwise, why should it be tentative? There is no pretense whatever that it was done after that time.

The mere fact of enrollment affords no conclusive presumption that Barney Thlocco was living on April 1, 1899.

That Barney Thlocco was living on April 1, 1899, cannot be inferred from the fact of enrollment on the theory that such a finding, being necessary to support the enrollment, will be presumed. This was the contention in the case of *Moffat* v. *United States*,

112 U. S. 24, which was a suit to set aside a patent, and in which the court said:

> "It may be admitted, as stated by counsel, that if, upon any state of facts, the patent might have been lawfully issued, the court will presume, as against collateral attack, that the fact existed; but that presumption has no place in a suit by the United States assailing the patent and seeking its cancellation for fraud in the conduct of those officers."

This language from the *Moffat* case was quoted in *United States* v. *Minor, supra*, and it was there stated that the principle is equally applicable when the officers of the Land Department have been imposed upon by the party to whom the patent was issued. In other words, whether the officers of the Land Department were themselves wholly innocent or guilty of misconduct, the question always was whether the patentee was lawfully entitled to receive the patent. No matter how the patent came to be issued if its issuance was unlawful, it worked a fraud on the Government, and therefore, though unassailable collaterally, the Government could always bring a suit to set it aside, unless the patent was issued upon a judgment or as a consequence of judicial proceedings. In *United States* v. *Minor, supra*, the lower court dismissed the bill of the United States on demurrer on the theory that the allowance by the

land officers of the pre-emption claim and the issuance of said patent were conclusive as against the United States. The Supreme Court reversed the ruling of the lower court and said:

> " The learned judge whose opinion prevailed in the Circuit Court and is found in the record, has been misled by confounding the present case with that of *United States* v. *Throckmorton*, 98 U. S. 61, and *Vance* v. *Burbank*, 101 U. S. 514, and thus applying principles to this case which do not belong to it.
>
> " In *Throckmorton's* case, it is true, a part of the relief sought was to set aside a patent for land issued by the United States. But the patent was issued on the confirmation of a Mexican grant after proceedings prescribed by the Act of Congress on that subject. These proceedings were judicial. They were commenced before a board of commissioners. There were pleadings and parties, and the claimant was plaintiff and the United States was defendant. Both parties were represented by counsel, the United States having in all such cases her regular District Attorney to represent her. Witnesses were examined in the usual way, by depositions, subject to cross examinations, and not by *ex parte* affidavits. From this tribunal there was a right of appeal to the District Court, and from that court to the Supreme Court of the United States by either party. There was nothing wanting to make such a proceeding, in the highest sense, a judicial one, and to give to its final judgment or decree all the respect, the verity, the conclusive-

ness, which belong to such a final decree between the parties. The patent could only issue on this final decree of confirmation of the Spanish or Mexican grant, and was, in effect, but the execution of that decree. It was to such a case as this that the ruling in *Throckmorton's* case was applied."

Clearly the trial court in this case fell into a similar error, and failed to distinguish between proceedings which are *ex parte* and those which are adversary and result in a binding judgment conclusive in its character and effect, and it was therefore error to exclude the evidence offered by the Government.

II.

The only adjudication of the issue as to whether Barney Thlocco was living on April 1, 1899, was adverse to the contention of the defendants. The Commission to the Five Civilized Tribes and the Secretary of the Interior determined, after a formal inquiry and hearing, that he died prior to that date and ordered the cancellation of his enrollment, which order was in fact carried out, and his name stricken from the roll of Creek citizens on December 13th, 1906, and it was error to exclude the evidence offered by the Government to prove such adjudication and cancellation of the enrollment.

The Secretary had supervision and control of the enrollment of citizens with power to correct and revise the same up to March 4, 1907.

The defendants at first claimed that having once placed the name of Barney Thlocco on the rolls, the Secretary of the Interior had no power to withdraw his approval of such enrollment. As an abstract proposition, this is not true, as was held in *Lowe* v. *Fisher*, 223 U. S. 107. The same contention was there made, but the court held that up to March 4, 1907, under the power given to the Secretary of the Interior, by congressional legislation, he had authority to withdraw his approval of an enrollment. The *Lowe* case was an application for mandamus by several Cherokee negroes who had been enrolled as freedmen. The Secretary afterwards found that they were not entitled to enrollment under the provisions of the Acts of Congress, and were therefore enrolled without authority of law. Conceding this power, however, the defendants insist that the attempted cancellation of the enrollment was a nullity because made without notice. Such is not the holding of the courts. The fact that no notice was given does not render the action of the Secretary void.

—*Acers* v. *Snyder*,
8 Okla. 662;
Sorels v. *Jones*,
110 Pac. 743;

American Mortgage Co. v. *Hopper*,
12 C. C. A. 294;
Guaranty Savings Bank Co. v. *Bladow*,
44 L. ed. 542.

In the case last cited, a public land entry was cancelled by the Secretary of the Interior after the entryman had given a mortgage on the land. The entryman had notice of the hearing upon which the cancellation was ordered, but his mortgagee had had no such notice. It was held by the court in a suit by the mortgagee to enforce its mortgage, that the cancellation of the entry without notice to it, was not a nullity, but had the effect of destroying the right of the mortgagee to use the certificate of entry as *prima facie* evidence of the entryman's claim. In the *Hopper* case, the entry of one Waddell was cancelled as fraudulent without notice to him. The court held that he was entitled to have his day in court and an opportunity to be heard, and that such opportunity was given him and his grantees in the suit by the American Mortgage Company, but that he made no attempt in that suit to show that the entry was not fraudulent.

The question before the court in the case at bar was whether Barney Thlocco was enrolled without authority of law because he was not living on April 1, 1899. The Commission to the Five Civilized Tribes

and the Secretary had found that he was not living on that date, and cancelled his enrollment for that reason. The fact that it was done without notice did not affect the jurisdiction of the Secretary over the subject matter, nor render his action a nullity, which the defendants could ignore. If the defendants had any rights which were affected by the action of the Secretary, they had the right to their day in court and an opportunity to be heard. That opportunity was given them in this case to show precisely what they might have shown in a hearing before the Secretary after notice to them, that is, whether Barney Thlocco was living on April 1, 1899, the only difference, as we see it, being that the burden of proof was upon them in this case instead of upon the Government, after the Government had proven the cancellation of the enrollment. To state the proposition more definitely, our contention is, that in a hearing before the Secretary, the defendants would have been entitled to rely on the presumption which the enrollment afforded as *prima facie* evidence of the fact that Barney Thlocco was living on April 1, 1899, and therefore entitled to enrollment, and the burden was on those asserting that he was not living on that date. The cancellation of the enrollment, not being void, but voidable only, as to any persons whose rights it might affect, would raise a similar presumption that Barney Thlocco was *not* entitled to enroll-

ment, and the burden was on the defendants to show that Barney *was* so entitled, notwithstanding the action of the Secretary of the Interior. In other words, the cancellation destroyed the right of the defendants to use the enrollment as *prima facie* evidence of the fact that Barney Thlocco was living on April 1, 1899. It was upon this theory, and which is supported by the cases above cited, that the Government offered as its first proof, that part of the Creek Roll showing the elimination of Thlocco's name therefrom by direction of the Secretary of the Interior on December 13, 1906. Upon its being excluded by the court, the Government offered to prove the proceedings of the Dawes Commission instituted on August 25, 1904, which embodied the record of a formal inquiry as to whether Barney Thlocco was in fact living on April 1, 1899, the evidence submitted upon that issue, the finding of the Commission that he died prior to April 1, 1899, the judgment upon such finding, the approval of such finding and judgment by the Secretary of the Interior, and the cancellation of the enrollment as a consequence thereof. If the position of the Government is sound, such evidence was competent and should have been admitted.

This view is not opposed to the rule announced in *Garfield* v. *Goldsby*, 211 U. S. 254. In that case,

Goldsby was a living person, duly enrolled as a Chickasaw citizen, and had selected, and received a certificate for his allotment of land, which certificate, under the Choctaw-Chickasaw Agreement, was conclusive evidence of his right to the land therein described. Without notice to him the Secretary struck his name from the rolls. It was held that under the circumstances, the right of Goldsby to be heard before his property could be taken away was of the essence of due process of law. But under the circumstances in the case at bar, as we shall hereafter see, no property rights had vested, when the Secretary cancelled the enrollment, and there was no one entitled to notice. *Turner* v. *Fisher*, 222 U. S. 204, was the same kind of a case as the *Goldsby* case, namely, a mandamus proceeding to restore the name of the relators to the rolls. In the *Turner* case, the the answer of the Secretary set up that the relators were not citizens of the Creek Nation and that their enrollment was obtained by fraud. To this answer, the relators demurred, and standing upon their demurrer, the writ was denied and the action of the Secretary in striking from the roll their names, was allowed to stand, which is certainly inconsistent with the theory that such action was a nullity.

The Act of April 26, 1906, did not affect the right of the Secretary to withdraw his approval of the enrollment of Barney Thlocco.

The court, however, in response to a question by counsel, based his exclusion of the above offer made by the Government, not upon the ground of want of notice, but upon the ground that title had passed by the issuance of the patents under the Act of April 26, 1906, and that the Secretary of the Interior was, therefore without jurisdiction on December 13, 1906, to withdraw his approval of the Thlocco enrollment. (Tr., P. 42.)

In this view we find it impossible to concur, for the following reasons:

(a) The allotment was arbitrarily made by the Commission, no person ever having appeared to select the land in allotment.

(b) At the time of this arbitrary selection, Barney Thlocco was admittedly dead, and even if he had been lawfully enrolled, all right to the tribal property died with him.

(c) Neither the allotment certificate nor the patents were ever delivered or accepted, an act which was necessary before the investiture of individual rights to the land.

(d) The certificate of allotment and the patents therefor were issued to a dead man, and were therefore void.

(A)

Section 3 of the Original Creek Agreement provides:

" All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give to each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values, and any allottee receiving lands of less than such standard value may, at any time, select other lands which, at their appraised value, are sufficient to make his allotment equal in value to the standard so fixed."

Section 4 provides:

" Allotment for any minor may be selected by his father, mother or guardian, in the order named, and shall not be sold during his minor-

ity. All guardians or curators appointed for minors and incompetents shall be citizens.

" Allotments may be selected for prisoners, convicts and aged and infirm persons by their duly appointed agents, and for incompetents by guardians, curators or suitable persons akin to them, but it shall be the duty of said Commission to see that such selections are made for the best interests of such parties."

Section 5 provides:

" If any citizen have in his possession, in actual cultivation, lands in excess of what he and his wife and minor children are entitled to take, he shall, within ninety days after the ratification of this agreement, select therefrom allotments for himself and family aforesaid, and if he have lawful improvements upon such excess he may dispose of the same to any other citizen, who may thereupon select lands so as to include such improvements; but, after the expiration of ninety days from the ratification of this agreement, any citizen may take any lands not already selected by another; but if lands so taken be in actual cultivation, having thereon improvements belonging to another citizen, such improvements shall be valued by the appraisement committee, and the amount paid to the owner thereof by the allottee, and the same shall be a lien upon the rents and profits of the land until paid: *Provided*, That the owner of improvements may remove the same if he desires."

Section 7 provides:

> " Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who can not select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him."

On page 82 of the Sixth Annual Report of the Commission to the Five Civilized Tribes, it is said, in speaking of the provisions of the Act of June 28, 1898, known as the Curtis Bill:

> " In order, therefore, to give effect to the provisions of said act according to its design, and to enable every member of each tribe to select and have set apart to him lands to be allotted to him in amount approximating his share as aforesaid, the Commission to the Five Civilized Tribes is instructed, as a means preparatory to and in aid of the duty of allotment of the lands of said tribes required of it by said act, to proceed as early as practicable to establish an office within

the territory of each tribe, provided with proper and suitable records, including a copy of the United States survey of the lands of the tribe, for the purpose of registering each and every selection of lands made by any member of the tribe for his allotment; and in order to make such selection of lands by any member of the tribe effective and valid such member, or the head of each family shall be required to appear in person at the office within his tribe and to make application to one of the members of said Commission or to some one by said Commission authorized to act for it in performing such duty, to have set apart to him the lands selected by him for himself and wife and minor children; and such application shall be prepared by some member of said Commission, or the person so authorized, and the applicant, shall be required to therein make oath that he has, in person actually been upon the lands so selected by him, and is fully informed as to the location of the same and the character of the soil; that the land is suitable for a home for himself and family; that he has in good faith selected such lands, and will accept same in allotment to himself and family; that no part of same is lawfully held by any other member of the tribe; and thereafter he may occupy, control and rent the same for any period not exceeding one year by any one contract until lands are in fact allotted to him under the terms of said act, and will be protected therein by the Government, from interference by all other persons whomsoever. Selections may be made

for orphans, incompetents, and prisoners, by guardians and relatives.

"Any selection of lands otherwise made by any member of any tribe, and any rent contract made for any longer period than one year, or for other than the current year, shall be void."

So far as we know, these rules have never been altered or repealed.

There is nothing in the provisions of the Creek treaty above quoted which abrogates, but the same are entirely consistent with, the rules of the Secretary relative to the selection of allotments, except that in section 7, the Commission is given authority to *arbitrarily select* a homestead for a certain class of persons, to-wit: "minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves." Under the rule that the inclusion of one thing is the exclusion of another, the provisions of section 7 would appear to be the full extent of the Commission's authority to make arbitrary allotments.

(B)

The defendants admit that Barney Thlocco was dead at the time the certificate and patents were issued, and this being true, even if he was originally entitled to enrollment, all right to the tribal property

died with him. In other words, no right to the land in controversy ever vested in him or his heirs.

Section 28 of the Original Creek Agreement provides:

> " No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> " All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

It has been consistently held that the inception of title is the actual selection of the allotment.

—*Brann* v. *Bell*,
192 Fed. 427;

McKee v. *Henry*,
201 Fed. 74;

Hooks v. *Kennard*,
28 Okla. 457.

In *Sizemore* v. *Brady*, 235 U. S. 441, it was contended that the Original Creek Agreement, relating to the allotment and distribution of the tribal lands and funds, was in the nature of a grant *in praesenti* and invested every living member of the tribe and the heirs of every member who had died after April 1, 1899, with an absolute right to an allotment of lands. As to this contention, the court said:

> " To this we cannot assent. There was nothing in the agreement indicative of a purpose to make a grant *in praesenti*. On the contrary, it contemplated that various preliminary acts were to precede any investiture of individual rights. The lands and funds to which it related were tribal property, and only as it was carried into effect were individual claims to be fastened upon them."

(C)

The evidence in this case shows that the patents never were delivered, but are still in the possession of the officers of the Government. The delivery and acceptance of a patent are essential to pass the title.

Section 23 of the Original Creek Agreement provides:

> " Immediately after the ratification of this agreement by Congress and the tribe, the Secretary of the Interior shall furnish the principal chief with blank deeds necessary for all conveyances herein provided for, and the principal chief shall thereupon proceed to execute in due form and deliver to each citizen who has selected or may hereafter select his allotment, which is not contested, a deed conveying to him all right, title and interest of the Creek Nation and of all other citizens in and to the lands embraced in his allotment certificate, and such other lands as may have been selected by him for equalization of his allotment.
>
> " * * * Any allottee accepting such deed shall be deemed to assent to the allotment and conveyance of all the lands of the tribe, as provided herein, and as a relinquishment of all his right, title and interest in and to the same, except in the proceeds of lands reserved from allotment.
>
> " The acceptance of deeds of minors and incompetents, by persons authorized to select their allotments for them, shall be deemed sufficient to bind such minors and incompetents to allotment and conveyance of all other lands of the tribe, as provided herein."

On page 193 of the Report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1904, is contained the decision of the Creek

Allotment Contest of *Lobay Major* v. *Lou Thompson*, and in which it was said, by the Secretary of the Interior:

> " The acceptance of the deed (allotment patent) has the effect of the execution and delivery of a deed of release of the allottee's interest in other communal lands allotted to others of the tribe, like the voluntary deed in partition of one of several common owners. This makes acceptance of the deed a part of the transaction of partition or allotment of the communal property in severalty to the individual members of the communal owners."

The Atoka Agreement, which is part of the Curtis Act, had the same provisions with reference to the acceptance of patents, and in *Choate* v. *Trapp*, 224 U. S. 665, it was held that after delivery and acceptance of the patents, the Indian became vested with the title, impliedly, at least, recognizing the necessity of such acceptance. Section 5 of the Act of April 26, 1906, provides:

> " That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee, shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall

descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect; and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior, to the party entitled to receive the same: *Provided*, The provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

These very provisions of the act are a recognition by Congress that prior to that time, the mere issuance and the filing in the office of the Commission of a patent, did not pass the title, but that delivery and acceptance of the same were necessary to have that effect; otherwise, what was the necessity for such legislation? The court below, however, was of the opinion that these provisions related back to the issuance of the patents to Thlocco, and operated to vest the title in his heirs as of the date of the patents. But the act is not susceptible of that construction. It refers only to patents *hereafter* issued. There is nothing in the act from which it can be ar-

rived that retrospective operation was intended. The rule in this respect is laid down in Sutherland on Statutory Construction, paragraph 642:

> " The rule is that statutes are prospective, and will not be construed to have a retroactive operation unless the language employed in the enactment is so clear that it will admit of no other construction."

To give the act retroactive operation would be to divest the Secretary of the Interior of the very power which the same act in terms recognizes, to-wit: the right and jurisdiction up to March 4, 1907, to revise and correct the rolls. If he could not exercise that right in the case at bar, it would only be because rights had vested in the allottee in consequence of the enrollment before the passage of the act. The act created no new rights. It operated only on equitable titles vested prior to its passage, and for the purpose of perfecting the legal title. No equitable title to the lands in controversy ever vested in Barney Thlocco, for even if living on April 1, 1899, he died before an allotment was selected. The act indeed contemplated such a case as we have here. The work of the Dawes Commission in allotting the lands to those who had been enrolled was necessarily proceeded with on the assumption that every person on the rolls was entitled to an allotment. Practically

all the Creek lands had been allotted long before the passage of the Act of April 26, 1906. At the time of the passage of that act, the Secretary had under investigation just such a case as Congress must have had in mind. To say that the provisions of that act ended his power to correct the roll would be to make the act destroy itself. It is not contended, and could not successfully be contended that the right to the land in this case vested in any one prior to the act. In whom did such rights afterwards vest, simply by operation of its provisions? Not in the heirs of Thlocco; they had done nothing; no allotment had been made to them and no application was made by them for such allotment. They were asserting no claim to the land. The appellant, although that burden was not upon it, offered to show in the court below that the lands were unoccupied public domain long after the cancellation of the Thlocco enrollment; this offer was excluded. The grantees, or lessees, of the heirs, could of course take nothing, and never claimed anything. Yet, we are told in effect, that in spite of themselves, the law forced upon the heirs a title to the land in controversy, which immediately became paramount to any rights of the Creek Nation and to the right of the Secretary to correct the erroneous enrollment. This cannot be the law.

The so-called *Hawkins* case settles this point. Speaking of the provision of section 5 above quoted, it was there said:

> " These laws have no application where there is no allottee. The language used in section 5 assumes that there is in existence a legal allottee and provides for the contingency of the death of the allottee before the patent becomes effective. This law provides that if the death of the allottee occurs before the patent becomes effective, the land shall inure to and vest in his heirs. Section 32 is to the same effect. It assumes that deeds have been issued to a legal allottee, who has died before the approval of the deed. Neither section deals with the case where there never was an allottee in existence."

(D)

As the allotment of the land in controversy was made to, and the patents issued in the name of, a dead man, the same is void.

It has often been decided that a deed or patent to a dead man conveys nothing, and is a nullity.

—*Moffatt* v. *United States*,
112 U. S. 24;

McLeod v. *United States*,
187 Fed. 281;

Colorado Coal & Iron Co. v. *United States*,
123 U. S. 203;

McDonald v. *Smalley*,
6 Pet. 261;
Galt v. *Galloway*,
4 Pet. 332;
Moreham v. *Phelps*,
21 How. 294;
Iowa Land & Trust Company v. *United States*,
217 Fed. 10.

In the case last cited, a certificate of allotment and the patent for the land so selected in allotment were issued to Chester Hawkins, in his name. Chester Hawkins, at the time the allotment was made and the patents issued, had been dead for several years, and in fact had died prior to April 1, 1899, and was not entitled to an allotment. The court held that for the purpose of receiving an allotment of land, he was a mere myth, and that the patents so issued to him, and not to his heirs, was a nullity and passed no title. So we say in this case that Barney Thlocco got nothing by virtue of the patents issued to him, and therefore his heirs took nothing. They had no rights which could be affected by the action of the Secretary in striking their ancestor's name from the rolls. They were not claiming as allottees in their own right; up to the time the Secretary cancelled the enrollment of Barney Thlocco, they had made no claim to the land in controversy, had never taken

possession of it, and were exercising no rights of ownership over it whatever.

We do not think that the case of *Skelton* v. *Dill*, 235 U. S. 206, is authority to the contrary. In that case, the facts were that one Archie Hamby was born in February, 1900, and died in July, 1901, being survived by his parents and one sister. His mother was a Creek and his father a white man. Two or three years after the child's death, he was enrolled by the Dawes Commission, and the lands in question in that case were allotted in his name. Patents to the lands were also issued in his name, and it was said in the opinion that such patents, by operation of law, vested the title in his heirs. Whether the patents in that case did, by operation of law, vest the title in the heirs of Archie Hamby, was not put in issue. Each of the parties claimed under the same grantors, and the case was tried upon the assumption that title had passed. In any case, if the court intended to pass directly on the question, its statement that the patent, by operation of law, vested the title in the heirs of the patentees, doubtless rests upon the following provisions of the Act of Congress, approved June 25, 1910, which is very much broader than the Act of April 26, 1906:

> " Where deeds to tribal lands in the Five Civilized Tribes have been, or may be, issued in

pursuance of any tribal agreement, or any Act of Congress, to a person who has died or who hereafter dies, before the approval of such deed, the title to the land designated therein shall inure to and become vested in the heirs, devisees or assigns of said deceased grantee, as if the deed had been issued to the deceased grantee during life."

But as the Secretary of the Interior withdrew his approval of the enrollment of Barney Thlocco before the passage of the Act of June 25, 1910, such act would have no application to this case.

III.

The testimony submitted by the Government showed that there was no proof before the Dawes Commission amounting to legal and substantial evidence that Barney Thlocco was living on April 1, 1899, and his enrollment upon such proof is an error of law for which the allotment may be cancelled.

If we assume that the Commission found specifically that Barney Thlocco was living on April 1, 1899, or that the fact of enrollment was in itself a finding and determination of that fact, then we insist that there was no evidence before the Commission, sufficient as against direct attack by the Government to cancel the patent, to justify his enroll-

ment. We think that this is clear from what has already been said on this subject. The court in its oral opinion at page 111 of the transcript, calls attention to the testimony of the witness, Merrick, who said that in copying data from the old census card to the new census card, he changed the post-office and also the age of Barney Thlocco, and that because of this decrepancy, it was the *opinion* of the witness that he must have had "some information" about Thlocco in addition to that furnished by the cards themselves. This is a mere inference and conclusion of the witness; but suppose he had "some information," such information does not refer to the crucial question in the case, that is to say, whether Barney Thlocco was living on April 1, 1899, but is quite consistent with the theory on which the Commission evidently listed his name, tentatively, to-wit, that he was then a living person, there being no proof that he was dead. That he was enrolled as a living person is further evidenced by the fact that the allotment was made and certificate and patents for the same were issued in his name and not to his heirs. *If he was not enrolled as a living person on May 24, then he was enrolled without proof, and without any knowledge on the part of the Commission, as to whether he was living or dead.* If the Commission had determined he was dead, a record of that fact would have been made in accordance with the usual

practice of the Commission as testified to by the witnesses. This record would have been in the form of an affidavit of death or by a notation on the card in ink as a permanent record. Neither of these things were done. The truth is, and it is perfectly evident from the whole record, that the Commission knew nothing about Barney Thlocco on May 24, 1901, except that his name was on the tribal roll and that he was alive as late as 1898; that he was listed tentatively to save any possible rights which he might have had to enrollment, in order to satisfy the Creek Tribal Council and secure its ratification of the agreement, and that such listing of Barney Thlocco's name was subject to further investigation as to whether he was living or dead, and as to the date of his death. The Government offered to prove that the Commission instituted such an investigation of his right to enrollment and upon such inquiry determined what they could have discovered in May, 1901, had there been a hearing on the matter then, that Barney Thlocco was *not* living on April 1, 1899. This offer and the ruling of the court thereon excluding it, is one of the assignments of error. This evidence was competent, not only for the purpose of supporting the allegations of the bill that Barney Thlocco was not living on April 1, 1899, but the very fact that the Dawes Commission did conduct such investigation to determine whether Barney Thlocco was living on April

1, 1899, is persuasive evidence that they had never adjudicated that question prior to such investigation.

In order that this court may see just what was in the mind of the learned judge below on this question, we call attention to his oral opinion, announced on the argument of an objection to certain evidence, and found on pages 111-13 of the transcript. The court had announced orally on the trial that it would be necessary for the Government to make out a *prima facie* case that the Commission to the Five Civilized Tribes enrolled Barney Thlocco without any evidence, and with reference thereto, the court said:

> " Has the Government made a *prima facie* case on that point? That is, has it by clear and convincing proof shown to the court that the Commission acted in enrolling Thlocco without any evidence whatever? If the proof on the other hand, clearly convinces the court that it did have evidence, or if the proof is such as to leave the court's mind in a state of doubt as to whether there was evidence or not, in my judgment, the Government has failed to establish that *prima facie* case. I have examined, as I say, the evidence of all these witnesses, Mr. Merrick, Mr. Hastain, Mr. Hopkins, Mr. Bixby and Mr. Lieber in particular. Mr. Merrick's testimony in view of the fact that he himself made the card, probably affords the court the most direct light on the controversy. A very significant feature

of the case as developed by Mr. Merrick's testimony, and as developed by a comparison of the census card as made by him on May 24, with the old census card is this: That whereas the evidence differs that in other instances, a greater or less number of instances, the census cards which were made on that date, and on the prior days in May, were made from the tribal rolls and the census card, in this case it clearly develops that the census card which Mr. Merrick made must have been made on evidence outside of and in addition to the rolls and the old census card, for the reason that the age of Barney Thlocco and his post-office address is given as different from that which appeared on the census card. It follows, therefore, that as to those particular statements, there must have been before Mr. Merrick evidence in addition to that contained in the documents to which I have referred. It doesn't follow as a matter of positive conclusion that that evidence affected the question as to whether Barney Thlocco was living or dead on April 1, 1899, but it does show that Mr. Merrick, in the case of that card, didn't just follow the rolls and the old census card, and take no evidence whatever. There must have been before Mr. Merrick some investigation outside of those documentary features. The evidence is clear here that at the time these cards were made up, Barney Thlocco's as well as the others, the Commission with its large force was there securing as far as it could evidence sufficient to enable it to complete these census cards which were to become the basis of the schedules which

would finally be forwarded to the Secretary for his approval, and make up the roll. There was the tribal council in session and the Town Kings were there. The evidence clearly shows that they had access to the Town Kings; that they had parties out bringing in evidence. That the evidence in enrolling the Creeks, was largely, almost entirely, except in contest cases, oral, and not made a matter of record, so that unfortunately we have not now here any record to show what was before the Commission, but in view of that fact and in view of the evidence here, the court can't say as a fact—can't find as a fact that there was no evidence before the Commission on that day, or that there was no evidence at some subsequent time pursuant to investigation which the Commission made, and made before the schedule was made up and forwarded to the Secretary, can't find as a fact from the evidence in this case, in my judgment, that there was no such evidence. There has been offered in evidence here and permitted to become a part of the record, the proceedings of October 16, 1903, which appears to have been in the course of an examination with regard to certain unaccounted for Creeks, a great number of them. It appears that when the Town King was being examined, that he was questioned with regard to Barney Thlocco's name on the roll, and he speaks of him as Barney Thlocco on the 1890 roll. As Barney on the 1895 roll. He is asked with regard to his death in relation to the burning of a certain hospital, or house of some character. There is evidence that that is a circum-

stance to show that that was the investigation, and the only investigation, which the Commission ever made with regard to the question of Barney Thlocco's existence on April 1, 1899. That was permitted as a circumstance, but when considered in connection with the evidence of Mr. Merrick, Mr. Hastain, Mr. Bixby and Mr. Hopkins with regard to the manner in which this enrollment was handled, the statement of these gentlemen, offered by the Government, their positive statements that there must have been evidence with regard to Barney Thlocco's existence April 1, 1899, or his name would not have been forwarded for enrollment, in view of those statements, the court cannot find that this evidence clearly and convincingly establishes the fact that there was no evidence prior to the time the schedule was forwarded. If that is true, as I view the province of this Commission, it was made an agency of the Government to determine the question of Barney Thlocco's right to enrollment, and when that question was determined, and the questions of fact determined by the Commission necessary to establish his right to enrollment, those questions of fact, when the enrollment is approved by the Secretary of the Interior, stand as determined for all time in all courts, until they are attacked as having been based upon fraudulent testimony or having been arbitrarily found without any testimony."

It is clear, we think, that the court was governed in his ruling, not by the positive evidence of any facts

submitted as to whether Barney Thlocco was living on April 1, 1899, but by inference and conclusions drawn by the witnesses as to what evidence *might* have been before the enrolling party because of the acts done, particularly the conclusions of the witnesses Merrick and Tams Bixby, who was chairman of the Commission, and who testified that he never enrolled any person without evidence. But after all, this simply amounts to saying that Barney Thlocco will be presumed to have been living on April 1, 1899, because that will be implied from the fact of his enrollment. In other words, because his enrollment will be presumed to be lawful rather than unlawful, the fact that he was living on April 1, 1899, will also be presumed, because that was a necessary prerequisite. Such conclusion, as we have stated before, might be true in a collateral proceeding, but to hold the ruling applicable in a direct suit by the Government to cancel the patent, is to say that the presumption cannot be rebutted, and therefore, that no evidence at all, no matter how clear and convincing, was competent or admissible to show that Barney Thlocco was not living April 1, 1899.

We submit also that the court was mistaken in its application of the rule announced in the adjudicated cases, particularly the *Maxwell Land Grant* case, 121 U. S. 325, where it was said:

"We take the general doctrine to be that when in a court of equity, it is proposed to set aside, to annul or to correct a written instrument, for fraud or mistake in the execution of the instrument itself, the testimony on which this is done, must be clear, unequivocal and convincing, and that it cannot be done upon a bare preponderance of evidence which leaves the issue in doubt."

The application to this case of the rule requiring clear and convincing evidence upon which the patent to Thlocco may be set aside, requires only that the Government should prove by that character of evidence that Barney Thlocco was not living on April 1, 1899, and not that there was no evidence before the Commission that he was living on that date. If there was any burden on the Government to prove its case by negative evidence of that character, such burden was discharged when it was shown that there was no hearing, inquiry, issue nor finding on the fact.

The rule in the *Maxwell* case was invoked and applied in *McLeod* v. *United States*, 187 U. S. 261, and in *Colorado Coal & Iron Company* v. *United States*, 123 U. S. 307. The last case was one in which the Government filed its bill to cancel a patent to public lands on the ground that the patentees were fictitious persons. The defendant pleaded that he was a purchaser in good faith, but the Circuit Court

held that the patentees were fictitious and that no title whatever passed. On appeal to the Supreme Court, the inquiry was whether the Circuit Court was right in holding that the patentees were fictitious persons, and this was the sole question examined by the court. This court, with the rule in the *Maxwell* case before it, reviewed the whole evidence upon the question as to whether the patentees were fictitious, and found that such evidence was not clear, unequivocal and convincing *on that question*, saying that it did not necessarily follow that no such persons in fact existed as a necessary conclusion from the testimony of the witnesses that they *knew* no such person.

"Manifestly," as was said in *McLeod* v. *United States*, *supra*, in analyzing the *Colorado Company* case:

> "Had the evidence in the case before the Supreme Court, been clear, unequivocal and convincing, to the effect that the grantees named in the patent did not in fact exist, but were fictitious persons, the court would have held with the Circuit Court that the legal title to the lands in question did not pass from the United States by virtue of the patents, because there was, in fact, no grantees."

If the Government, in the case at bar, had been permitted to introduce its evidence, on the question of

whether Barney Thlocco was living or dead on April 1, 1899, and had satisfied the court, by clear, unequivocal and convincing evidence, that he was not living on that date, the effect would have been to establish the falsity of whatever information the Commission had before it in the enrollment of Barney Thlocco. Frankly, we do not understand upon what principle the Government should have been required to prove by "clear and convincing evidence" that there was no evidence before the Commission that Barney Thlocco was living on April 1, 1899, and then be required to prove by the same character of evidence, that he was dead on that date.

The rule in any case is not applicable to the facts in this case. It has never been applied, that we know of, except in cases involving the rights of third persons, claiming under the patentee and defending as bona fide purchasers without notice. Such were the cases cited above. Necessarily, the rule could not apply to the patentee himself, and to whom a patent has been made for lands to which he never had any right, either legal or equitable, regardless of the question whether he himself, or the officers of the Government, were responsible for the issuance of the patent. In neither case could he plead that he acquired a vested right under a wrongful act. Neither could the rule apply to the heirs of such persons, who,

of course, took no greater interest than their ancestor. As the defendants in the case at bar made no claim to be bona fide purchasers and do not base their defense on such claim, we think the court was clearly in error in ruling that the Government must first show by clear and convincing proof that the Dawes Commission had no proof before it that Barney Thlocco was living on April 1, 1899, before it could be permitted to show affirmatively that he was in fact dead on that date.

We insist that whatever information the Commission had before it in enrolling Barney Thlocco, the record shows that it was not legal or substantial evidence on the question as to whether Thlocco was living on April 1, 1899. To render judgment on such evidence adverse to the interests of the Creek Nation and of the Government, would be an error of law for which the patent would be cancelled. *United States* v. *Dibbell*, 227 Fed. 160, was a suit by the United States to cancel a patent to a Sioux Indian for land allotted to him and held in trust by the United States, without power of alienation. The patent had been issued under the provisions of an act giving the Secretary of the Interior power to so do whenever he was satisfied that the allottee was capable of managing his own affairs. The patent was issued by the Secretary upon the statement of the Indian

Agent that the allottee was "worthy to be entrusted with the patent in fee simple and I therefore recommend that his request be granted." It was held that this was not sufficient representation as to the Indian's competency to manage his own affairs; that there was no substantial evidence of that fact before the Secretary, and that his adjudication of the fact, without substantial evidence to sustain it, was an error of law which vested in the United States a cause of action in equity, to avoid the patent upon that adjudication. We respectfully submit, therefore, that conceding everything that the defendants claim for it, there was no substantial evidence before the Commission on the question whether Barney Thlocco was living on April 1, 1899, when it enrolled him as a living person on that date, and that the determination of that fact upon such vague and indefinite information as it might have had before it, as shown by the record, was an error of law for which the allotment may be cancelled.

In this case, the enrollment was not complete until approved by the Secretary of the Interior. The Secretary had in fact approved the enrollment of Barney Thlocco, but in view of the fact that he had nothing before him except the usual letter which accompanied the schedules, how can it be said that his act in approving the enrollment was judicial or *quasi*

judicial in its character? He had nothing before him upon which he could exercise such a judgment. He was not reviewing the action of the Dawes Commission. There was nothing to review. He was simply approving, in an administrative way, a purely administrative act.

Conclusions.

The duty of the Commission to the Five Civilized Tribes and of the Secretary of the Interior, under the various Acts of Congress, was to distribute the lands and property of the Creek Nation among those lawfully entitled thereto. That property consisted of lands and money. The allotment of the lands in severalty among the members of the tribe was a part only of its duty. Having decided that Barney Thlocco was not entitled to share in the property of the tribe, the Secretary struck his name from the rolls in order that, so far as he was able to do so, the trust imposed in him might be properly discharged, that is, so far as the remaining property and moneys of the tribe were concerned. But as a patent had been issued to Barney Thlocco, for an allotment of 160 acres of land, to which he was not lawfully entitled, the Secretary was unable to fully discharge the obligation of the Government, in that he was powerless to cancel the patent, this being a ju-

dicial act, even though the patent was void. (*Moran* v. *Horsky*, 178 U. S. 205.) Accordingly, a suit was instituted in the Circuit Court of the United States for the Eastern District against the unknown heirs of Barney Thlocco, for the purpose of cancelling the patent. A decree was entered in the case in accordance with the prayer of the bill, and afterwards this decree was vacated on the ground that the court had no jurisdiction to entertain a suit against unknown heirs, and on November 1, 1913, the Government dismissed such suit, and on the same day filed the bill in this case.

The theory of the present suit is that as the patents to Barney Thlocco were issued to a person not entitled to any lands in the Creek Nation, and in violation of the rules of the Creek people and of the Acts of Congress, the issuance of such patents impaired the ability of the Government to fulfill its obligations to distribute the property of the tribe among its members, and this suit was in fact to restore to the Department of the Interior that jurisdiction and right of which it had been deprived by reason of the erroneous issuance of patents to a person not entitled thereto.

—*Hughes* v. *United States*,
4 Wall. 232;
Germania Iron Co. v. *United States*,
165 U. S. 379.

The issuance of a patent attempting to convey lands belonging to the Creek Nation to a person not entitled thereto, is certainly ground for the interference of a court of equity, especially where no rights of innocent third parties have intervened or become vested in reliance upon the action of the Government. *Moffatt* v. *United States*, 112 U. S. 24. The *Moffatt* case was a case to cancel patents to fictitious persons. The sole contention of the Government in that case was that it is a jurisdictional requirement that a person seeking pre-emption should be the identical person in whose name the application was made, and that the Register and the Receiver have no more jurisdiction, when the proceedings are taken in a fictitious name, than the Ordinary has to grant letters testamentary or of administration of a living man. The court held that a fictitious person received public lands, and that there was no transfer of the property, and that no one, not even a subsequent purchaser in good faith, could derive any right from such conveyance. Fraud in that case was shown, that is, fraud in the sense of intentional wrong-doing, but fraud was necessary to prove the fact in issue, that is, whether the patents were issued to fictitious persons, or not. In the case at bar, it was not necessary to show fraud in that sense to prove that Barney Thlocco died prior to April 1, 1899. The Government contended that it should have been per-

mitted to prove the cancellation of the enrollment and that the defendants were bound to take notice of it, as affecting any title which they sought to acquire. The roll is a link in the chain of title. In the *Hawkins* case, it was argued that fraud was alleged, and that the court found there was fraud in securing the enrollment, yet its decision is not based on that fact, but on the fact that Hawkins was not entitled to enrollment because he died prior to April 1, 1899. Had the decision been based simply on the ground of fraud as a head of equity jurisdiction, the court could not have reached the conclusion that there were no bona fide purchasers, because of course, a purchaser without notice of fraud is protected. Regardless of the question of fraud, if for any cause, a patent is issued to a party not entitled thereto, the remedy is open in a court of equity to the wronged party, either by cancellation of the patent or by declaring the patentee to be a trustee of the true owner.

—*Stark* v. *Starr*,
6 Wall. 402;
Burnier v. *Burnier*,
147 U. S. 242.

In the case at bar, the lands were withdrawn from the Creek Nation and given to one who was not entitled to receive it. The defendants made no claim that they are bona fide purchasers, even if, under the

facts, such a defense would have been good. The equities are with the Government, as trustee for the Creek Nation. The defendants, as the heirs of Barney Thlocco and their grantees, certainly have no paramount equity in these lands. In *Cunningham v. Ashley*, 14 How. 377, Cunningham claimed the right to enter the land which was the subject of controversy. After many hearings, the Land Department decided that he had no right to do so and rejected his claim. The defendant was permitted to enter the land and receive patents from the Government. Justice McClain, in delivering the opinion of the court, said that this final decision of the officers of the Land Department was the result of twenty years of controversy, but nevertheless, he held that the rights of Cunningham were paramount to those acquired by the entry of the defendants, and the judgment in their favor; that while the cause had been in contest and had received the consideration of the Receiver, the Register, the Commissioner of the Land Office, the Attorney General and the Secretary of the Interior, all of whom had concurred in rejecting Cunningham's claim, yet that the court would look into the equities of the case and set aside the acts of all these officers because they had erred, both as to the law and the fact, to the prejudice of the complainant.

We submit, therefore, with the utmost confidence, that the evidence offered by the Government to show that Barney Thlocco died prior to April 1, 1899, and that in fact such was the actual finding and the only judicial finding of the Commission which enrolled him, and also that the evidence offered by the Government to show that the approval of his enrollment was withdrawn by the Secretary of the Interior upon the finding of the Commission that he died prior to April 1, 1899, before any title to the allotment passed from the Creek Nation, should have been admitted, regardless of what proof to the contrary may have been in the possession of the Commission when it placed him on the roll, and that the exclusion of such evidence was based upon a theory not supported by the decisions and upon a wholly erroneous conception of the principles applicable to the case. Counsel for the defendants on the trial below did not produce a single authority to sustain their objection to such evidence. Surely the Government cannot be bound by a falsehood, or by proceedings to which neither it nor the Creek Nation was a party. There is no theory of the law and no principle of equity, with which we are familiar, under which the Government is estopped to show the truth as to the date of Thlocco's death.

From the record here presented it is established beyond question:

First, that whatever evidence was had when Barney Thlocco was enlisted for enrollment, was taken in *ex parte* proceedings, and which hardly amounted to even that; that the Creek Nation was not represented at the time such evidence was taken and had no opportunity to dispute it or to inquire into its correctness; that no record was made of any such evidence; that such evidence, as the principal defendant admits, was in fact not disputed for the reason that there was no opportunity for an interested party to dispute it; that there was in fact no hearing before the Dawes Commission as a body and sitting as a tribunal to hear and determine a definite controversy; that there was no issue before the Commission on the question of the date of the death of Barney Thlocco prior to his enrollment, and consequently there could not have been a judicial finding on that question. The Government proposed to show, not merely by the testimony of 20 witnesses and documentary evidence, that the evidence, if there was any before the Commission, was necessarily false, but also proposed to show that the Commission itself never considered that it had made any such finding prior to his enrollment, but that upon subsequent investigation it found upon evidence submitted and

preserved, that he was dead on April 1, 1899, and that his enrollment was cancelled for that reason and as a result of such investigation.

Second, that no rights in the land had vested in the heirs of Barney Thlocco, or in their grantees or lessees, prior to the action of the Secretary in withdrawing his approval of the Thlocco enrollment; that no one was in possession of land or claiming it prior to the institution of this suit, except as to that part of it claimed by the intervenor, Johnathan Posey, and his lessees; that no injury, therefore, will be done by a decree cancelling the patents for the defendants do not claim or plead that they are bona fide purchasers, but stand squarely upon the proposition that the enrollment and the issuance of patents are conclusive of all the matters alleged in the bill, and are, therefore, immune from attack.

Third, that even upon the defendants' own theory that the Commission had adjudged Barney Thlocco to have been living on April 1, 1899, there was, as appears from the record, no legal or substantial evidence to support such judgment.

Respectfully submitted,

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